TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 364.

PULLMAN'S PALACE CAR COMPANY, PLAINTIFF IN ERROR,

vs.

JEANNIE CAMPBELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED NOVEMBER 8, 1892.

(14,407.)

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1 UNITED STATES OF AMERICA,
Northern District of Iowa.

Pleas before the circuit court of the United States in and for the northern district of Iowa, western division, at a term begun and holden at Sioux City, in same district, on the 1st day of October, A. D. 1889, before the Hon. Oliver P. Shiras, judge.

JEANNIE CAMPBELL
vs.
PULLMAN'S PALACE CAR COMPANY. } No. 132. Law.

Be it remembered that heretofore, to wit, on the 16th day of September, A. D. 1889, there was filed in the office of the clerk of the circuit court of the United States in and for the northern district of Iowa, western division, and in above-entitled cause a transcript from the district court of Iowa in and for Woodbury county; which transcript is in the words and figures following, to wit:

Original Notice, District Court.

STATE OF IOWA,
Woodbury County, } *ss:*

In the District Court of Woodbury County, at May Term, A. D. 1889.

JEANNIE CAMPBELL
vs.
PULLMAN'S PALACE CAR COMPANY.

Original notice.

To Pullman's Palace Car Company, defendant:

You are hereby notified that on or before the 17th day of
2 May, 1889, a petition will be filed by said plaintiff, Jeannie Campbell, in the office of the clerk of the district court of said Woodbury county, Iowa, claiming of you the sum of twenty thousand ($20,000.00) dollars damages for injuries sustained on or about Feb'y 15th, 1889, while a passenger on one of defendant's cars, between Manilla and Sioux City, in the State of Iowa, by reason of the negligence of defendant and by reason of the breach by defendant of the duty and obligation owed by it to the plaintiff and the breach of its contract with the plaintiff as such passenger, in that plaintiff was outrageously assaulted while so on said car aforesaid by one of the employés of defendant & no protection was furnished her, whereby she has suffered damages in said sum of $20,000.00.

And that unless you appear thereto and defend before noon of the first day of the next term of said court, commencing at the

court-house in Sioux City, Ia., the 27th day of May, 1889, default will be entered against you and judegment rendered thereon.

Dated this 15th day of May, 1889.

(Signed) JOY, HUDSON & JOY,
Attorney-for Plaintiff.

The within notice came into my hands on the 15 day of May, 1889, and on May 15, 1889, I served the same on the within-named defendant, Pullman's Palace Car Company, by serving the same on J. F. Wilson, ticket agent of said company, at Sioux City, Ia., by reading the same to him and delivering him a true copy thereof; all done within Woodbury county.

(Signed) D. A. MAGEE,
Sheriff Woodbury County, Io.,
By O. H. RYE, *Deputy.*

3 In the District Court of Iowa in and for Woodbury County, May Term, 1889.

JEANNIE CAMPBELL
vs.
PULLMAN'S PALACE CAR COMPANY. } Petition.

Plaintiff for cause of action states:

Par. 1st. That defendant is a corporation duly organized and existing under the laws of the State of Illinois, engaged in furnishing for hire to passengers travelling by rail, and holding itself out to the travelling public as so furnishing, superior accommodations, care, protection and attention, and opportunity to retire to bed at night in separate berths under the protection of defendant and its servants and employés.

Par. 2nd. That on the 15th and 16th of February, 1889, defendant was so engaged as aforesaid in running and operating a car between Chicago, Ill., and Sioux City, Iowa, in connection with the regular passenger train on the Chicago, Milwaukee and St. Paul railway, which arrived in Sioux City from Chicago on the morning of February 15th, 1889, and that plaintiff was a passenger on said car and train, holdin- a first-class passenger ticket of said railroad company from Chicago to Sioux City, and in addition thereto had purchased a ticket from defendant, and paid for the same, which entitled her to a seat and full berth on said car from Chicago to Sioux City and the care, attention, and protection aforesaid on the part of defendant and its employés.

Par. 3rd. That at the station of Manilla, Iowa, the defendant's conductor in charge of the said car left the same in charge of
4 the negro porter employed by defendant on said car for the remainder of the trip to Sioux City, and was at no time thereafter present on said car to afford care, attention, or protection to plaintiff; that plaintiff was the only through passenger to Sioux City, and during the latter part of the night preceding the arrival of said train at Sioux City and after said conductor had left the said

car, and after all other passengers had left said car, and while said plaintiff was alone in said car with said porter, and while plaintiff was lying in her berth, said porter came to her said berth, and forcible and against the will and remonstrances of plaintiff made an outrageous and indecent assault upon plaintiff's person, and insisted upon getting into said berth with plaintiff and having sexual intercourse with her, and threatened to effect his purpose by force, and informed her that there was no other person on said car to hear her cries for help or answer them; that plaintiff was compelled to and did use her utmost strength and force to escape from said porter, and did escape from him and gained the ladies' closet on said car and locked herself therein, and was compelled to and did remain therein with slight and insufficient clothing until daylight, through fear of further violence on the part of said porter in case she left said room, and that after leaving said room just before reaching Sioux City said porter threatened to kill her in case she ever told any one what had occurred.

Par. 4th. That by means of said assault and said threats plaintiff suffered an intense nervous shock and severe and permanent injury to her spine, by reason whereof plaintiff became and was prostrated, sick, and delirious, and suffered a miscarriage, and for six weeks following said assault endured the most intense agony, so that she was delirious the greater part of the time and has remained sick and feeble since then, and at the time of filing this petition is still sick and confined to her house and still suffers great pain and agony at times by reason of the injuries aforesaid.

Par. 5th. That prior to said injuries plaintiff was a woman of strong, healthy, and vigorous constitution, unaffected by any nervous disorder or derangement, but that by reason of the injuries aforesaid she has suffered a permanent shock to and derangement of her nervous system and will be for the remainder of her life subject to nervous recurring attacks of nervous disorder and derangement; that plaintiff has become weak and debilitated and unable to perform her household duties and will never be able so to do nor to regain her physical vitality and health, and that by reason of said injury to her spine and said injury to her nevous system she is permanently unfitted to fulfill the duties of a wife and mother; that plaintiff is a married woman and was with *with* child at the time of the assault and injuries aforesaid, but suffered a miscarriage by reason of said injuries.

Par. 6th. That by reason of the injuries and pain and suffering and permanent disabilities aforesaid plaintiff has been damaged in the sum of twenty thousand dollars ($20,000).

Wherefore plaintiff prays judgement against defendant for twenty thousand dollars ($20,000.00) and costs of this suit.

(Signed) JOY, HUDSON & JOY,
Attorneys for Plaintiff.

STATE OF IOWA, *Woodbury County,* } ss:

Jeannie Campbell, being duly sworn, on oath says that
6 she is the plaintiff above named; that she has heard the foregoing petition read, and that the allegations therein contained are true, as she verily believes.

(Signed) JEANNIE CAMPBELL.

Subscribed in my presence and sworn to before me, a notary public, by the said Jeannie Campbell this 17th day of May, A. D. 1889.

(Signed) C. L. JOY,
[SEAL.] *Notary Public in and for said County and State.*

Filed May 17th, 1889.
(Signed) R. E. SACKETT, *Clerk.*

STATE OF IOWA, *County of Woodbury,* } ss:

In the District Court of Woodbury County.

JEANNIE CAMPBELL, Plaintiff,
vs.
PULLMAN'S PALACE CAR COMPANY, Defendant.
} Petition to Remove this Case to the United States Circuit Court.

To the honorable the district court of Woodbury county, State of Iowa:

Your petitioner, Pullman's Palace Car Company, respectfully shows that it is the defendant in the above-entitled suit; that the matter in dispute therein exceeds, exclusive of interest and costs, the sum of two thousand dollars.

Your petitioner further shows that said suit is of a civil
7 nature at law for the recovery of damages against said defendant in the sum of twenty thousand dollars ($20,000) for an assault upon said plaintiff.

Your petitioner further shows that in the said above-mentioned suit there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between your said petitioner, who avers that it was at the commencement of this suit and still is a citizen of the State of Illinois, and the said Jeannie Campbell, who your petitioner avers was at the commencement of this suit and still is a citizen of the State of Iowa, and that both the said Jeannie Campbell and your petitioner are actually interested in said controvercy; that the defendant is a corporation duly organized as such under and by virtue of the laws of the State of Illinois and is a citizen of said State, and is a non-resident of the State of Iowa.

And your petitioner offers herewith a bond with good and sufficient surety in the penal sum of five hundred ($500) dollars, con-

ditioned for his entering in the circuit court of the United States for the northern district of Iowa, on the first day of its next session, a copy of the record in this suit, and for paying all cost that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to proceed no further herein, except to make an order for removal as required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States within and for the northern district of Iowa, according to the statute in such case made and provided.

8 And your petitioner will ever pray, etc.

(Signed) PULLMAN'S PALACE CAR COMPANY,
By W. T. RANKIN, *Attorney.*

(Signed) HUBBARD, SPALDING & TAYLOR,
Attorney for Petitioner.

STATE OF IOWA, }
Woodbury County, } *ss:*

W. T. Rankin, being duly sworn, on oath deposes and says that he is attorney and agent of Pullman's Palace Car Company, a corporation, defendant in the above-entitled cause; that he has heard read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true, as he verily believes.

(Signed) W. T. RANKIN.

Subscribed and sworn to by said W. T. Rankin this 27th day of May, A. D. 1889.

(Signed) E. H. HUBBARD,
Notary Public of Iowa in & for Woodbury Co.

May, A. D. 1889.

Filed this 27th day of May, A. D. 1889.

[SEAL.] (Signed) R. E. SACKETT, *Clerk.*
GEO. M. HOKE, *Dep.*

Bond.

Removal of cause.

Know all men by these presents that we, Pullman's Palace Car Company, a corporation, as principal, and George M. Pullman, of Chicago, Illinois, and Thos. J. Stene, of Sioux City, in the county of Woodbury and State of Iowa, as surety, are held and firmly bound unto Jeannie Campbell and all other persons whom it may concern in the penal sum of five hundred ($500.00) dollars, lawful money of the United States; for the payment which, well and truly to be made, we bind ourselves and our heirs, executors,

or administrators, jointly and severally, and firmly by these presents.

9 Whereas Pullman's Palace Car Company, principal above named, has petitioned the district court of Woodbury county, in the State of Iowa, for the removal of a certain suit therein pending, wherein Jeannie Campbell is plaintiff and the said Pullman's Palace Car Company is defendant, into the circuit court of the United States for the northern district of Iowa, western division:

Now, therefore, the condition of this obligation is such that if the above-bounden Pullman's Palace Car Company shall enter in such circuit court of the United States, on the first day of its next session, a copy of the record in such suit, and shall pay all costs that may be awarded by said circuit court, if said circuit court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear in said circuit court and enter special bail in such cause if special bail was originally required therein, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the United States court, then this obligation to be void; otherwise of force.

Witness our hands and seals this 25th day of May, 1889.

(Signed) PULLMAN'S PALACE CAR COMPANY,
" By GEO. M. PULLMAN, *President.*
" THOS. J. STONE.

Filed this 27th day of May, 1889.

R. E. SACKETT, *Clerk.*
GEO. M. HOKE, *Dep.*

Approved May 27th, 1889.
(Signed) R. E. SACKETT, *Clk.*
GEO. M. HOKE, *Dep.*

JEANNIE CAMPBELL
vs.
PULLMAN'S PALACE CAR CO. } No. 4999. Law.

10 And, now, at this time, to wit, May 27, 1889, the court having examined the petition and bond for removal of this cause to the United States circuit court finds them to be in due form.

The court further finds that the cause is one for removal to the United States circuit court under the act of Congress, and the bond being sufficient and approved by the court, the court finds that defendant's petition for removal should be sustained.

It is therefore ordered by the court that this cause be transferred to the United States circuit court for the northern district of Iowa.

Read, approved, and signed in open court.

(Signed) GEO. W. WAKEFIELD, *Judge.*

STATE OF IOWA, } ss:
Woodbury County, }

I, R. E. Sackett, clerk of the district court within and for said county, do hereby certify that the foregoing is a true and correct copy of the papers filed and of the record in the case of Jeannie Campbell, plaintiff, *versus* Pullman's Palace Car Company, defendant, as full and complete as the same appear on file and record in my office.

Witness my hand and the seal of said court, hereto affixed, at my office, in Sioux City, Iowa, this 14th day of September, A. D. 1889.

[L. S.] R. E. SACKETT,
Clerk District Court.

(Endorsed:) Transcript. No. 132 Transcript. Woodbury county, Iowa. Jeannie Campbell *vs.* Pullman's Palace Car Company.
11 Filed Sept. 16, 1889. A. J. Vanduzee, cl'k, by J. H. Bolton, d'p'ty. Joy, Hudson & Joy, attorneys for plaintiff. Hubbard, Spalding & Taylor, attorneys for defendant.

Costs trans. 325 *re* by defendant, P. Sackett.

And afterwards, to wit, on the 1st day of October, A. D. 1889, there was filed in the office of the clerk of said court, in the said cause, a motion for more specific statement; which motion is in words and figures following, to wit:

In the Circuit Court of the United States, Western Division.

JEANNIE CAMPBELL *vs.* PULLMAN'S PALACE CAR CO. } Motion to Make Petition More Specific.

Now comes the defendant, in the above-entitled action, and moves that plaintiff be required to make her petition more specific in this:

1st. Let her *send* forth or attach to her petition a copy of the ticket of the Chicago, Milwaukee & St. Paul Railway Co. therein referred to.

2nd. Let her set forth or attach to her petition the ticket of defendant therein referred to.

3rd. Let her state the name of the alleged porter of defendant who is charged with committing the assault upon her.

4th. Let her state the date when her sickness and the alleged miscarriage occurred.

5th. Let her state specifically what, if any, portion of the damages claimed in said petition and for loss of time; what, if any, portion thereof are for inability to perform her household duties; what, if any one, for inability to perform the duties of a
12 wife and mother; what, if any one, for the miscarriage; and *and* what, if any one, for pain and suffering. Let her also state what portion, if any, of the same claimed is for actual and what for exemplary damages.

HUBBARD, SPALDING & TAYLOR,
Att'ys for Def't.

No. 132. *N.* S. circuit —. Jeannie Campbell *vs.* Pullman Palace Car Co. Motion to make petition more specific. Filed Oct. 1st, 1889. A. J. Vanduzee, cl'k, by J. H. Bolton, d'p'ty.

And afterwards, to wit, on the 3rd day of October, A. D. 1889, there was filed in the office of the clerk of said court an amended petition in said cause; which amended petition is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, -estern Division.

JEANNIE CAMPBELL
vs.
PULLMAN PALACE CAR CO.

Comes now the plaintiff, and by leave of court first had and obtained, amends her petition herein by adding thereto the following—

That by reason of said illness plaintiff has been compelled to employ nurses and physicians and has been to great expense, to wit, for medicine, $20; for medical attendance, $260; for nursing, $130.

JOY, HUDSON & JOY,
Attorneys for Plaintiff.

13 STATE OF IOWA, *Woodbury County.* } *ss:*

Duncan Campbell, being duly sworn, on oath says that he is the husband of the plaintiff; that he has read the foregoing amendment to petition and knows the contents thereof and has personal knowledge of the matters and things therein set forth, and that the allegations therein contained are true.

DUNCAN CAMPBELL.

Subscribed in my presence and sworn to before me by the said Duncan Campbell this 2nd day of October, 1889.

A. L. HUDSON,
Notary Public.

(Endorsed:) 132, law. Jeannie Campbell *vs.* Pullman's Palace Car Co. Amendment to petition. Filed Oct. 3rd, 1889. A. J. Vanduzee, cl'k, by J. H. Bolton, d'p'ty.

And afterwards, to wit, on the 4th day of April, A. D. 1890, there was filed in the office of the clerk of said court an answer and a stipulation in the said cause; which answer and stipulation is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

JEANNIE CAMPBELL
vs.
PULLMAN'S PALACE CAR COMPANY. } Answer.

Answering the petition of plaintiff, with the amendment thereto, this defendant respectfully alleges and shows to the court:

1st. This defendant admits that it is a corporation duly organized and existing under the laws of Illinois, as in paragraph one
14 of the petition alleged. The defendant admits that on the 15th and 16th of February, 1889, it was engaged in operating a car between Chicago and Sioux City in connection with the regular passenger train of the Chicago, Milwaukee and St. Paul Railway Company, and that the same arrived in Sioux City on the morning of the 15th of February, 1889, and that plaintiff was a passenger thereon, holding a first-class ticket from the said railway company, and had purchased and paid for a ticked from defendant for a seat and berth in said sleeping car of defendant.

2nd. That otherwise than herein admitted defendant denies each and every allegation in said petition and amen-ment thereto contained.

Wherefore defendant asks to be dismissed with costs.

HUBBARD, SPALDING & TAYLOR,
Attorneys for Defendant.

(Endorsed:) No. 132, law. Circuit court of United States for northern district *court* of Iowa. Jeanne Campbell, plaintiff, *vs.* Pullman's Palace Car Co., defendant. Answer. Filed April 4th, 1890. A. J. Vanduzee, cl'k, by J. H. Bolton, d'p'ty clerk. Hubbard, Spalding & Taylor, attorneys for defendant.

In the Circuit Court of the United States in and for the Northern District of Iowa.

JEANNIE CAMPBELL
vs.
PULLMAN'S PALACE CAR CO. } Stipulation.

It is hereby agreed by and between the parties to the above-entitled action that the depositions taken on behalf of
15 plaintiff and now on file in said action may be now opened and taken from the lerk's office by the defendant for the purpose of examining the same.

JOY, HUDSON —, *Att'ys for Plaintiff.*
HUBBARD, SPALDING & TAYLOR,
Att'ys for Def't.

And afterwards, to wit, on the 10 day of May, A. D. 1890, there was filed in the office of the clerk of said court in said cause instructions asked for by defendant, court's charge to the jury, verdict of the jury.

Which instructions asked, court's charge, and verdict are in the words and figures following, to wit:

In the Circuit Court of the United States in and for the Northern District of Iowa.

JEANNIE CAMPBELL, Plaintiff,
vs.
PULLMAN PALACE CAR CO., Defendant.

Instructions Asked by Defendant.

1st. You are instructed that the present action is one brought upon an express contract, and that every material allegation relating to said contract must be proven by the plaintiff before she can recover; unless, therefore, she has proven to your satisfaction that under said contract she was entitled to the care, attention, and protection of the defendant company and its employees, the plaintiff cannot recover.

16 Refused; no issue to which the same can be applied.

2nd. The plaintiff having failed to introduce the contract between herself and the defendant, and having failed to show what that contract was, or what obligations to provide for the safety and security of plaintiff or her immunity from insult and injury, is not to be inferred from her purchase or possession of defendant's ticket, and defendant, therefore, is not li*l*able in this action.

Refused.

3rd. You are instructed that this action is based upon an express contract with the plaintiff that before she can recover anything she must prove by a preponderance of the evidence that the defendant has broken the said contract, and if you find that the said contract was broken by the said defendant then plaintiff can recover only the actual damages resulting therefrom, and cannot recover any damages to punish defendant, or such as are in law called exemplary damages. Covered by general charge.

4th. You are instructed that plaintiff having failed to establish and prove by the evidence the contract set out in the second paragraph of the petition, she cannot recover in this action.

Refused.

5th. You are instructed that an employer is not liable for a willful injury done by an employee though done while in the course of his employment, unless the employee's purpose was to serve his employer by the willful act, and if you find that the alleged assault was not made with the purpose to serve the defendant company, then you should find for the defendant.

Refused.

17 6th. You are instructed that the defendant is not responsible in this action for a malicious assault made by the porter of its sleeper while he was not engaged in the performance of his duties as a porter and when such assault was not made for the purpose of serving said defendant by his willful act, and if you shall

find in this case that the alleged assault was not made by the porter while engaged in the performance of his duties, then you should find for the defendant.

Refused.

7th. You are instructed that if the act of the porter was not necessary to the performance of the service of the defendant and was not intende- for the purpose, but was committed, if committed at all, only to gratify his own lust, then the act was not within the scope of his employment and the defendant is not liable therefor.

Refused.

8th. You are instructed that if the defendant is liable at all it is liable only for the direct and immediate consequences of whatever breach of contract may have occurred and only for such damages as were fairly within the contemplation of the parties when the contract was made. The defendant is not liable for any damages resulting from the peculiar condition of the plaintiff, such condition not having been known to the defendant and the contract no having been made with reference thereto. If you shall find that the plaintiff was in a pregnant condition, that such condition was not made known to the defendant and did not enter into the contemplation of the parties to the contract, then defendant is not responsible for any damages resulting specially from such pregnancy.

Refused.

18 9th. You are instructed that if plaintiff passed through her miscarriage and was recovering therefrom and that by her imprudence or negligence she brought upon herself the inflam--ation from which resulted the lasting injuries of which she now complains, then the defendant should not be held responsible for such lasting injuries.

Given in general charge.

10th. You are instructed that defendant is responsible, if responsible at all, for such injuries only as are the direct consequences of the wrong complained of and is not responsible for such injuries as may afterwards have resulted from her own imprudence and negligence.

Given in general charge.

11th. You are instructed that under the contract between Pullman Palace Car Co., the defendant, and the C., M. & St. P. R. R. Co. the porter of the sleeping car attached to the train of said railroad company upon which plaintiff was riding on the 16th of February, 1889, was the servant of the said railroad company in all respects save as to such matters as pertained to the arrangements peculiar to a sleeping car and was under its direction and control in all the matters, including the protection of passengers from insult and injury, and you should, therefore, find for the defendant.

Refused.

12th. You are instructed that if you find from the evidence that the porter who is charged with having committed the assault upon the plaintiff was not at that time under the direction and control of the defendant, but was, in fact, acting under the control of the

Chicago, Milwaukee & St. Paul R. R. Co. in all matters re-
19 lating to the protection of passengers from insult and injury, then he was not the servant of the defendant relating to such matters, and defendant is not responsible for the assault, if any, made by him.

Refused, no evidence justifying the giving of the instruction.

13th. If the porter charged with the assault was under the direction of the C., M. & St. P. R'y Co. and the proper employers of the latter road had the right to direct and control him in all matters save those relating to the care of what pertained exclusively to a sleeping car, then the railway company is responsible for any assault he may have made upon the plaintiff, and defendant is not liable in this action.

Refused, no issue or evidence making it applicable.

14th. You are instructed that if the porter who is charged in this case with making the assault was furnished by the defendant to the Chicago, Milwaukee & St. Paul R'y Co. under the contract offered in evidence and was thereunder subject to the control and direction of said railroad company and not of defendant, then you should find for the defendant.

Refused.

15th. The responsibility of the railway company for the safety and security of its passengers is not diminished by the fact that the same passengers may have contracts with the sleeping-car company for accommodation upon its cars. The duty of the sleeping-car company is to provide the arrangements peculiar to their cars, while the duty of the railway company is to see that the passengers on such cars constituting a part of its trains shall be pro-
20 tected from insult and injury, and for any failure to so protect them, it, and not the sleeping-car company, is liable.

Refused.

132, law. Campbell & Pullman Palace Car Co. Instructions asked by dep't. Filed May 10, 1890. A. J. Vanduzee, cl'k; J. H. Bolton, d'p'ty.

In United States Circuit Court in and for Northern District of Iowa.

JEANNIE CAMPBELL
vs.
PULLMAN PALACE CAR COMPANY.

GENTLEMEN OF THE JURY: In the cause now on trial before you the plaintiff, Mrs. Campbell, claims damages against the defendant, The Pul-man Palace Car Company, in the sum of twenty thousand dollars for injuries which she claims were caused to her when she was an occupant of the sleeping car furnished by defendant for use as a sleeping car upon a train of passenger cars operating the Chicago, Milwaukee & St. Paul R'y Company between Chicago, Ills., and Sioux City, Iowa, such injuries being alleged to have been caused by the misconduct of the porter employed by defendant upon said sleeping car. Before passing to the statement of the

particular issues to be submitted to you in this cause it is proper for me to instruct you as to the relation existing between the Pu-l-
man Company and persons occupying the sleeping cars fur-
21 nished by the defendant company for the use of the trav-ling public.

As I construe the contract between the defendant and the Chicago, Milwaukee and St. Paul R'y Company, the Pul-man Company agrees to furnish for the use of the public what are commonly known as sleeping cars, which, when in use, form part of the trains run by the railroad company for the transportation of passengers along its lines of railway.

The Pullman Company, by *these* furnishing cars to be used as sleeping cars by the travelling public, does not assume towards the persons occupying such cars — of a common carrier. It does not undertake the duty of transporting the passenger to his destination.

That duty is assumed by the railroad company and for the performance thereof the passenger must look to the company managing the railroad, and the Pullman Company is not liable for injuries received by the occupants of its cars from accidents connected with the movement of the train, nor is it responsible for the negligence or misconduct of those persons charged with the duty of the train, of which the sleeping car may form part.

Whilst, however, it assumes no responsibility for the mere transportation of the persons occupying the cars and does not occupy the relation of a common carrier to them, it, nevertheless, does assume certain duties and obligations to its patrons and becomes bound to the exercise of reasonable care in the performance thereof.

The Pullman Company, by its mode of managing *there* sleeping cars, represents to the traveling public that they may be occupied
with reasonable safety and comfort as sleeping cars, and by
22 and receiving pay for the use thereof the company agrees with its patrons that it will exercise ordinary care to secure the comfort and safety of those useing the same for *for* the purposes for which such cars are furnished.

The person or persons placed in charge of such sleeping cars by the Pullman Company is bound as the employé of the company to the exercise of ordinary care for the protection and comfort of persons useing such car in accordance with the regulations of the company. And if such person, either through failure to exercise proper care or by willful misconduct on his part, permits or causes injury to happen to an occupant of the sleeping car placed under his charge, the Pullman Company will be liable for the damages caused thereby.

In the answer filed in this cause the defendant admits that on the 15th and 16th days of February, 1889, it was engaged in operating a sleeping car on the *time* of the Chicago, Milwaukee and St. Paul R'y Company between Chicago, Illinois, and Sioux City, Iowa, in connection with the regular passenger train reaching Sioux City in the morning, and admits that the plaintiff was a passenger upon the passenger train in question and had purchased and paid for a

ticket from defendant for a seat and berth in said sleeping car belonging to defendant.

There is no conflict in the testimony adduced by the parties, plaintiff and defendant, touching the fact that the plaintiff was an occupant of the sleeping car which left Chicago on the 15th and reached Sioux City on the morning of the 16th of February, 1889. It then appears that the plaintiff was rightfully an occupant of said sleeping car at the time named and whilst in such car
23 whilst it was being conveyed to Sioux City, the plaintiff was entitled to demand of the defendant the exercise on its part of the ordinary case to *receive* to her the safe and comfortable use of the said sleeping car and its conveniences for the purposes for which said car was placed in *same* train.

In the performances of its duty in this respect the defendant company would be responsible for the willful misconduct, if any such there was, of its own employé placed in charge of same sleeping car when such misconduct was of such a nature as to interfere with the safe and comfortable use of said car by the plaintiff for sleeping-car purpose.

On part of plaintiff it is charged that the porter employed by the defendant and placed in said car did, on the morning of said 16th of February, 1889, between the stations of Manitea and Sioux City make an indecent assault upon plaintiff whilst she was occupying the berth assigned to her, placing his hands upon her person, making indecent proposal to her and exposing his person before her.

On part of the defendant it is denied that the porter did thus misconduct himself, that whilst it is true that the porter did go to plaintiff-' berth he did so for the purpose of arrousing her from an uneasy sleep and awakened her in the usual manner, and that plaintiff not being accustomed to trav-ling upon sleeping cars *her* to the sight of colored persons in close proximity to her and being then arroused may have been somewhat nervous and frightened and has thus been led to misconstrue the action and purpose of porter in going to her berth.

If, in fact, the porter on said car did act toward plaintiff in the manner charger by plaintiff such conduct on his part would
24 unquestionably be a violation of the duty due and owing from the defendant to the plaintiff whilst she was an occupant of said sleeping car. The pivotal point in the case, gentlemen, is this question of fact which you are called upon to decide. In determining this question you will be required to consider the credibility of the witnesses and the weight to be given to their testimony.

In considering these questions you take into account the pecuniary or other interest, if any, which a given witness may have in the result of the case, or the absence thereof, the appearance of the witness if brought before you, the manner of his testifying, his means of knowledge, and whether his testimony is corroborated or the contrary by the admitten or proven facts of the case.

For the purpose of attaching the credibility of witnesses it is permitted to either party to show that a given witness has made at

other times statements contradicting some material part or portions of his testimony, the proper foundation therefor being first laid.

In considering impeaching testimony of this character the jury should be careful to distinguish between such discrepancies in statements made at different times by a witness touching a given fact or transaction as may *material* arise from the usual imperfections of the human memory, and those which indicate an intention or part of a witness to prevaricate and mislead.

It is only those of the latter character that have weight as matter of impeachment.

The burden of the issue is upon the plaintiff and she must
25 satisfy you by a fair and reasonable preponderance of the evidence that in fact the porter in charge of said sleeping car was justly — of the misconduct charged against him before she can ask a verdict in her favor at your hands.

If the plaintiff *was* failed to satisfy you by a fair and reasonable preponderance of the evidence that the porter did commit the acts of misconduct alleged against him, then she has failed to make out her case and your verdict must be for the defendant. On the other hand, if by a fair and reasonable preponderance of the evidence you are satisfied that the porter in charge of said car was guilty of the alleged acts of misconduct towards the plaintiff, then your verdict should be for the plaintiff.

What, then, gentlemen, do you find the fact to be in this particular? Was or was not the porter guilty of the acts of misconduct alleged against him by the plaintiff?

You have heard the evidence adduced on behalf of the plaintiff, including her own testimony, giving the plaintiff's version of what occurred on the sleeping car on the morning of Feb'y 16th as it came from Mantea to Sioux City. You have likewise heard the evidence adduced on behalf of the defendant, including the testimony of the porter of the car, giving the defendant's version of what occurred on that occasion.

You have heard the evidence adduced by both parties touching plaintiff's arrival at Sioux City; the meeting her husband, going to the hotel, and thence to a boarding-house kept by Mrs. Fuller; touching the complaints made by plaintiff of the fright alleged to
have been caused her; touching the physical condition of
26 plaintiff; touching the complaint made by plaintiff; plaintiff's husband to the railway superintendent touching the interviews had between plaintiff's husband, the railway superintendent, the porter, and others, and all other matters introduced by both parties with the intent to throw light upon the main issue involved. Counsel for the respective parties have in their arguments before you presented the views taken by each party of the facts of the case and of the conclusions of fact they seek to deduce from the evidence submitted to you.

It is for you to calmly, dispassionately, and impartially consider the entire evidence thus submitted to you, and from it determine what the truth is upon this issue of fact between the parties.

If upon due consideration of the case you find that the porter employed on the sleeping car was in fact guilty of the misconduct alleged against him by the plaintiff, then your verdict should be for the plaintiff; but, on the other hand, if the evidence, by a fair and reasonable preponderance thereof, fails to satisfy you that he was guilty of such alleged misconduct, then your verdict should be for the defendant.

If upon this issue you find for the plaintiff, you will then be required to assers the damages to be awarded the plaintiff. What the plaintiff is entitled to, in case you find in her favor, is fair pecuniary compensation, the injuries naturally and immediately resulting from the outrage and wrong inflicted upon her.

She is entitled to be compensated for the mental and physical pain and suffering, if any, caused to her at the time, and which she
27 has since suffered as a *divert* consequences of the wrong done her.

On part of the plaintiff it is claimed that when she went upon the sleeping car she was in a pregnant condition; that the assault upon her brought on a miscarriage, which occurred within a few days after she reached Sioux City; that from the time of reaching Sioux City she was suffering and ill caused by the wrong done her, and that she is still suffering in her health and strength as a consequence thereof, and that she has been probably rendered barren and that she is not likely ever to fully recover from the injurious effects resulting to her from the wrongs complained of. On part of defendant it is denied that any such injuries were caused to the plaintiff; that whilst it may be true she suffered a miscarriage it was caused by plaintiff's own negligence and want of proper care when she was recovering from her first illness and from her improperly exposing herself at that time.

If the plaintiff through her own want of care and failure to exercise ordinary prudence and foresight aggravated the injuries under which she was at the time suffering and thereby caused the miscarriage, she cannot hold the defendant responsible therefor, as such result would then be due to her own negligent conduct.

Now, gentlemen, you have heard the evidence adduced by both parties on this question, including the evidence tending to show the condition of plaintiff immediately following her arrival in Sioux City, and what her condition was and what she did up to the time the miscarriage took place, together with testimony of the
28 physicians touching her condition and the cause of miscarriage, and from the entire evidence it is for you to say what the cause of the miscarriage was.

If you find that it was caused by the wrong done the plaintiff upon the sleeping car then the plaintiff is entitled to be compensated for the suffering caused thereby and for any injurious effects, temporary or permanent, directly caused to the plaintiff in her person, health, and strength by the wrong done her, including compensation for the pain and suffering, mental and physical, which has been caused to the plaintiff by reason of the wrong suffered by plaintiff.

The ascertainment of the amount to be awarded as compensation

for such injuries as you find the plaintiff is entitled to recover for, is of necessity entrusted to the sound, common-sense, and good judgment of the jury.

The case, gentlemen, is in your hands, give it the consideration it deserves and render the verdict which your impartial judgment approves as the proper response to the evidence submitted to you and the instructions given you by the court.

132. Campbell and Pullman Palace Car Co. Court's charge. Filed May 10th, 1890. A. J. Vanduzee, cl'k. J. H. Bolton, d'p'ty.

JEANNIE CAMPBELL, Pl't'ff,
vs.
PULLMAN PALACE CAR CO., D'f'd's.

We, the jury, find for the plaintiff and assess her damage at ($11,000.00) eleven thousand dollars.

A. HANSON, *Foreman.*

29 132. Law. Campbell & Pul-man Palace Car Co. Verdict. Filed May 10th, 1890. A. J. Vanduzee, cl'k. J. H. Bolton, d'p'ty.

And afterwards, to wit, on the 17th day of May, A. D. 1890, there was filed in the office of the clerk of said court a motion for new trial and in arrest in said cause, which motion, etc., is in the words and figures following, to wit:

In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division.

JEANNIE CAMPBELL, Plaintiff,
vs.
PULLMAN'S PALACE CAR COMPANY, Defendant.
Motion for New Trial and in Arrest.

Comes now the defendant and moves the court for a new trial of the above-entitled action and for grounds thereof states:

1. That the verdict of the jury is contrary to the evidence.
2. That the verdict of the jury is contrary to the instructions of the court.
3. That the amount of the verdict is excessive.
4. That the court erred in making — the presence and hearing of the jury certain remarks as to the evidence offered by the defendant for the purpose of showing the good character of the porter,
30 Albert Cæsar, a copy of which remarks is hereto attached, marked Exhibit "A" and made a part thereof; that such remarks were of such a nature as to destroy the value of said evidence and make it worthless before the jury.
5. That the court erred in making certain remarks in the presence and hearing of the jury when defendant propounded to its expert witness, Dr. R. E. Conniff, its hypothetical question, and the re-

marks of the court thereon and hereto attached, marked Exhibit "B," and made a part hereof; that said remarks entirely destroyed the weight and effect of said evidence and of all of defendant's expert evidence before the jury.

6. That the court erred in giving the following instruction: For the purpose of attacking the credibility of witnesses it is permitted to either party to show that a given witness has made at other times statements contradicting some material part or portions of his testimony, the proper foundation therefor being first laid. In considering impeaching testimony of this character the jury should be careful to distinguish between such discrepanc-es in statements made at different times by a witness touching a given fact or transaction as may naturally arise from the usual imperfertions of the human memory and those which indicate an intention on the part of a witness to prevaricate and mislead. It is only those of the latter character that have weight as matter of impeachment; said instruction being misleading in that it excludes from the effect of impeachment the showing of the infirmity of memory on the part of the witness and the incredibility of his statements owing to such infirmity.

7. That the court erred in refusing the instructions requested by the defendant, numbers 1 to 15, and each of said instructions.

31 Defendant further moves the court to arrest judgment herein and dismiss said cause or remand the same to the State court, and for grounds thereof states:

1. That it appears affirmatively from the evidence in said cause that the plaintiff, Jeannie Campbell, was not a citizen of the State of Iowa at the time of beginning said action nor at the time of the removal thereof, and has at no time been a citizen of said State, and that this court is without jurisdiction of said cause.

2. That it appears affirmatively from the evidence that at the time of beginning said action, and at all times since, the said plaintiff has been and is a citizen of the State of Illinois, of which State defendant is also a citizen.

HUBBARD, SPALDING & TAYLOR,
Attorneys for Defendant.

Q. What has be-n the character of that porter as for as you were connected with him?

A. First-class.

By COUNSEL FOR PLAINTIFF: That is objected to as immaterial and incompetent, and assuming that the character of this porter is in evidence in any way to show that he did not commit the offense, and we ask to have the answer excluded. If the charge was that the company was negligent in employing its men the evidence would not be immaterial, but that is not the allegation.

By the COURT: That is the way it strick's my mind. Now, as to illustrating the question of practice in criminal cases, it is well understood that in certain criminal casses the person may put

32 his previous good character in evidence before the jury for such consideration as they deem proper in view of all the

evidence in the case. A person's good character is evidence in his favor in certain classes of crimes. The query is whether that comes to be material in a case of this kind. This is a suit between Mrs. Campbell and the Pullman Palace Car Co. The character of the Pullman Palace Dar Co. is not in question at all. You have a witness by the name of Cæsar; you are trying to prove his good cha-cter; it is a fact he — a very material witness, because it is claimed he committed the act complained of; it is conceded that this case is neither for nor against him. If the issue is strictly as to negligence, and whet-er the Pullman Palace Car Co. had been negligent in selecting the proper sort of men, then this evidence would be competent, I think.

By COUNSEL FOR DEF'T: If our friends claim we are liable only for breach of contract, then I submit the testimony is not competent.

By COUNSEL FOR PLAINTIFF: The petition shows what we claim. It is a tort growing out of a contract; a wrongful breach of it in the assault; no allegation that the company were negligent in employing men, but simply by a breach of their contract to carry the plaintiff safely.

By the COURT: It don't seem to me to be material, but I do not want to make a ruling that might be error, and thereby have exception that might work a reversal. It strick*s* me that it is immaterial; the allegation is, did he in this particular instance do wrong?

By COUNSEL FOR PLAINTIFF: After consultation, we desire to withdraw the objection.

33 EXHIBIT "B."

Objections to Hypothetical Question.

Plaintiff objects to the question as immaterial, incompetent, and because the statement of facts *are* not as shown by the evidence and because there is no evidence showing such a state of facts.

By the COURT: My impression is that the question is not admis-ible. I will hear you on it, but that is my impression at present. In the first place it don't seem to me it is a proper question to go into—that kind of expert testimony. You have had your physicians who have examined this woman and have given their evidence before the jury. With that kind of evidence before us is it required to extend the rule in order to enable the facts to go before the jury and permit a physician on the stand who has not se-n the woman or had an opportunity to examine her to put a hypothetical question to him and let him guess? Assuming this to be the truth of the case, I can say, in the first place, it seems to me there are some gaps in your statement to begin with. Then you do not agree. Counsel do not agree and the physicians do not agree about certain facts. Unless you have all there is and there is no disputed fact it is of no value to have expert testimony on that question. It is a question for the jury to determine. As a rule

that is a thing you cannot call an expert witness to testify to, and you cannot take expert testimony on the issues before the jury. That is one of the fundamental rules. You may take their testimony in regard to certain matters that would throw light on the testimony, but I do not think you can ask such a question.

34 It is for the jury to determine. Assuming the woman had such injuries, you are asking this witness as to the facts as to its continued effect upon her.

By COUNSEL FOR DEF'T: That is true; but I objected to the hypothe-ical question of my friend Call this morning because I thought there were certain elements in the question that the evidence did not support. It occurs to me, if your honor please, the suggestion you make would go to the weight or value of the testimony rather than to its competency. Having put a question that is not sustained by the facts in the case, the jury will know it. To be sure one of the ultimate facts, one of elements in the case, is whether or not this woman's trouble is curable, and an expert might pass an opinion upon it. So in ascertaining the value of real estate in condemnation proceedings experts are required to testify.

By the COURT: Experts in such cases are persons who have personal knowledge. You cannot bring a person on that had never seen it and have him swear as to its value. You have to bring a person who knows as to the land to get his opinion as an expert. You inquire whether he has acquired a knowledge, and having found that he has knowledge you take his opinion. You cannot bring a person from Chicago and show that he is in the real-estate business in Chicago and describe a piece of land on the pra-rie that he has never seen—can you ask an opinion as to the value?

By COUNSEL -OR DEF'T: No, your honor; but physical conditions are presumed to be the same in all climes.

By the COURT: I do not want to keep out anything that can properly go in. There is a very nice difference between real

35 estate and the condition of a patient. We know by practical experience that patients differ. I do not suppose that a physician likes to form an opinion without seeing the patient and getting the assistance his observation gives him in that way and seeing the characteristics of the patient. We all differ in that regard, and that gives him some aid. You have had witnesses who have testified from knowledge acquired from examination, after they had an opportunity to examine her. If you had not been at liberty to avail yourself of that or if you had no opportunity——

By COUNSEL FOR DEF'*y*: Have we had an opportunity to examine?

By the COURT: In order to save any question about it I think I will overrule the objection and admit it, and perhaps take an opportunity of expressing my views on such evidence to the jury. My own judgment is that the jury should not give it any consideration at all, and I think I shall so express it to them under the circumstances.

By the COUNSEL FOR DEF'T: We do not wish any unusual method.

The development of the facts in the case show a certain state of facts to exist——

By the COURT: I mean- you to have had an opportunity. If this woman had refused to submit herself to examination it would be a different matter. You have had an opportunity and have had physycians who have had better opportunity to testify, and it seems to me the jury get all the light they can under that class of testimony.

By the COUNSEL FOR DEF'T: If the testimony of all the physicians were concurrent and harmonious——

36 By the COURT: That will never be until the millennium comes, and it is doubtful if it will then. That has been my experience.

1. Question read to the witness.

And afterwards, to wit, on the 10th day of September, A. D. 1890, there was filed in the office of the clerk of the said court in said cause a petition for writ of errror, writ of error bond, and writ of error citation.

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

JEANNIE CAMPBELL, Plaintiff,
vs.
PULLMAN'S PALACE CAR COMPANY, Defendant.

To the Honorable O. P. Shiras, judge of said court:

Now comes the Pullman's Palace Car Company, the defendant above named, by E. A. Hubbard, its attorney, and complains that in the records and proceedings, and also in the rendition of judgment, in a suit between Jennie Campbell, plaintiff, and said Pullman's Palace Car Company, defendant, tried in the circuit court

37 of the United States, in said northern district of Iowa, at the May term thereof, A. D. 1890, and in which judgment was rendered against it on the 7th day of July, A. D. 1890, manifest error hath intervened, to the great damage of the said defendant—

Wherefore defendant prays for the allowance of a writ of error, and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

E. H. HUBBARD,
Attorney for Defendant, Plaintiff in Error.

Upon examination of the foregoing petition it is this day ordered that the writ of error therein prayed for be allowed.

Dated this 9th day of September, A. D. 1890.

O. P. SHIRAS, *Judge.*

Filed Sept. 10, 1890.

A. J. VANDUZEE, *Clk,*
By J. H. BOLTON, *D'p'ty.*

In the Supreme Court of the United States.

JEANNIE CAMPBELL, Plaintiff, and Defendant in Error,
vs.
PULLMAN'S PALACE CAR COMPANY, Defendant, and Plaintiff in Error.

Know all men by these presents that we, Pullman's Palace Car Company, George M. Pullman, and N. B. Ream are held and
38 firmly bound unto Jeannie Campbell, of the county of Cook, in the State of Illinois, in the sum of twenty-two thousand dollars ($22,000), to be paid to the said Jeannie Campbell, her executors or administrators; *and* which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Dated this 9th day of September, A. D. 1890.

Whereas the above-named Pullman's Palace Car Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States, in and for the northern district of Iowa, rendered of the 7th day of July, 1890;

Now, therefore, the condition of this obligation is such that if the above-named Pullman's Palace Car Company shall prosecute its said writ of error to effect and answer all costs and damages therein if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

PULLMAN'S PALACE CAR COMPANY,
By G. W. PULLMAN, *President.*
G. W. PULLMAN.
N. B. REAM.

Sealed and delivered in the presence of—

CHARLES S. SWEET.
WM. T. REAM.

39 UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

George M. Pullman and N. B. Ream, being duly sworn, depose and say and each for himself sayeth that he is worth the sum of twenty-two thousand dollars ($22,000) over and above all his just debts and liabilities.

G. M. PULLMAN.
N. B. REAM.

Subscribed and sworn to before me and in my presence by the said George M. Pullman and N. B. Ream this 9th day of September, A. D. 1890.

A. S. WEINSHEIMER,
Notary Public.

I hereby approve the foregoing bond and sufficiency of the sureties thereto.

O. P. SHIRAS, *Judge.*

No. 132. Law. Jeannie Campbell & Pullman Palace Car Co. Appear bond. Filed Sept. 10th, 1890. A. J. Vanduzee, cl'k; J. H. Bolton, d'p'ty.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States in and for the northern district of Iowa, Greeting:

Because that in the records and process and also in the rendering of judgment in a suit before you, between Pullman's Palace Car Company, of Cook county, Ill., plaintiff in error, and Jeannie Campbell, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as in his complaint has been stated, and as it is just and proper that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded that if judgment be therein given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning the same, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the second Monday of October next, at Washington, in the said Supreme Court.

That, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 9th day of September, in the year
41 of our Lord one thousand eight hundred and ninety.

A. J. VANDUZEE,

[L. S.] *Clerk of the Circuit Court of the United States in and for the Northern District of Iowa.*

The foregoing writ is allowed by—

O. P. SHIRAS, *Judge.*

Filed Sept. 10, 1890.

A. J. VANDUZE, *Cl'k.*
J. H. BOTTON, *D'p'ty.*

UNITED STATES OF AMERICA, *ss:*

To Jeannie Cam-bell, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the no-thern district of Iowa and the western division thereof,

wherein Pullman's Palace Car Company is plaintiff in error and you are defendant in error, to show cause, if there be any, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable O. P. Shiras, judge of the said circuit court, this 9th day of September, in the year of our Lord one thousand eight hundred and ninety.

O. P. SHIRAS, *Judge.*

We do hereby accept and acknowledge due, complete, and legal service on us for Jeannie Campbell, defendant in error, of the
42 foregoing citation in Sioux City, Woodbury county, Iowa, this 10th day of September, A. D. 1890.

JOY, HUDSON, CALL & JOY,
Attorneys for Jeannie Campbell, Defendant in Error.

Filed Sept. 10th, 1890.

A. J. VANDUZEE, *Clk,*
By J. H. BOLTON, *D'p'ty.*

Record Entries.

And heretofore, to wit, on the 2nd day of October, A. D. 1889, the same being the second day of the regular October term, A. D. 1889, of said court, the following proceeding — had in said cause by said court and duly entered of record:

JEANNIE CAMPBELL
&
PULLMAN'S PALACE CAR CO. } No. 132. Law.

And now, at this time, to wit, Oct. 2nd, 1889, this cause is heard on def't's motion for a more specific statement of plaintiff's cause of action herein, which, being submitted to the court without agreement of counsel, the same is overruled.

Thereupon, with leave of court first obtained, plaintiff files amended petition, and it is the order of the court that defendant file answer within twenty days from this date, and this cause is continued.

And afterwards, to wit, on the 7th, 8th, 9th, 10th days of May and the 7th day of July, A. D. 1890, the same being the 2nd,
43 3rd, 4th, 5th, and 12th days respectively of the regular May term, A. D. 1890, *term* of said court, the following proceeding *now* had in said cause by said court, to wit:

JEANNIE CAMPBELL
&
PULLMAN'S PALACE CAR CO. } No. 132. Law.

And now at this time, to wit, May 7th, 1890, it being the time heretofore fixed, on notice of trial, this cause came up in oppen ses-

sion for the consideration of the court, the plaintiff appearing by her attorneys, Joy, Hudson, Call, and Joy, and the defendant appearing by its attorneys, Hubbard, Spalding & Taylor and John Runnells, and there came a jury of twelve good and lawful men, citizens of this District, to wit, C. E. White, J. G. Taylor, D. S. Wilde, John Medcalf, A. Wright, R. B. Weaver, James Cook, Eli Sockword, A. Hanson, John Heeht, Isaac Ward, and M. B. Whisman, who were duly impanelled and sworn to well and truly try the issues herein joined and a just and true verdict render according to the law and the evidence, and after the introduction of a portion of the evidence the further hearing of this cause is postponed until 9 o'clock a. m., May 8th, 1890.

JEANNIE CAMPBELL
&
PULLMAN'S PALACE CAR CO. } No. 132. Law.

And now at this time, to wit, May 7th, 1890, the parties of
44 this cause and their respective attorneys, and the jurors who were heretofore duly impanelled and sworn to try the issues herein joined, all being present, the trial of this cause is resumed, and after the introduction of additional evidence the further hearing thereof is postponed until 9 o'clock a. m. of May 9th, 1890.

JEANNIE CAMPBELL
&
PULLMAN'S PALACE CAR CO. } No. 132. Law.

And now, at this time, to wit, May 9th, A. D. 1890, the parties of this cause and their respective attorneys and the jurors who were heretofore duly impanelled and sworn to try the issues herein joined, all being present, the trial of this cause is resumed, and after the introduction of additional evidence and the arguments of counsel being concluded and the court having instructed the jury upon the law of the case, this cause is fully submitted to the jury, who retire to their room in charge of a sworn officer of the court to deliberate upon their verdict.

JEANNIE CAMPBELL
&
PULLMAN'S PALACE CAR CO. } No. 132. Law.

In this cause, the jury having duly considered the same and having agreed upon a verdict and being returned into court, deliver to the court the following verdict, to wit:

In the Circuit Court of the United States.

45 JEANNIE CAMPBELL
&
PULLMNN'S PALACE CAR CO.

We, the jury, find for the plaintiff and assess the damages at ($11,000.00) eleven thousand dollars.

A. HANSON, *Foreman.*

JEANNIE CAMPBELL
&
PULLMAN'S PALACE CAR CO. } No. 132. Law.

And now at this time, to wit, May 10th, 1890, this cause coming before the court upon the motion of plaintiff for the allowance of expert fees and the same being fully submitted to the court and the court being fully advised therein sustains said motion.

And accordingly it is the order and judgment of the court that a fee of four dollars per day be allowed and charged as expert fees for the following witnesses who testified in this cause, viz.: Dr. A. C. Bergen, Dr. R. E. Conniff, Dr. Marvin, Dr. W. Minneker, Dr. James Burry, Dr. Warren.

JEANNIE CAMPBELL
&
PULLMAN'S PALACE CAR CO. } No. 132. Law.

And now at this time, to wit, July 7th, A. D. 1890, this *this* cause came on for hearing upon the motion of the defendant for a new trial and in arrest of judgment, the plaintiff appearing by her attorneys, Joy, Hudson, Call & Joy, and the defendant appear-
46 ing by its attorneys, Hubbard, Spalding and Taylor; and thereupon said motion having been fully argued by the respective attorneys the same is submitted to —, the court being fully advised in the premises finds that said motion should be overruled and that judgment should be entered in favor of the plaintiff for the full amount of the verdict returned by the jury in this cause.

Accordingly it is the order and judgment of the court that the plaintiff, Jeannie Campbell, do have and recover of and from the defendant, Pullman's Palace Car Company, the sum of eleven thousand dollars ($11,000.00) and the costs of this action taxed at $199.90, to which ruling and judgment of the court defendant duly excepts.

And it is further ordered by the court that the defendant have and is hereby given until the second day of the October term of this court in which to submit a bill of exceptions.

Record entries.

CAMPBELL AND
PULLMAN'S PALACE CAR CO.

Costs 199.90.
Trans. 29.20.
P'd by def't.

47 In the Circuit Court of the United States, Northern District of Iowa, Western Division.

JEANNIE CAMPBELL
vs.
PULLMAN PALACE CAR COMPANY. } Bill of Exceptions.

Be it remembered that on the 6th day of May, 1890, the above-entitled action, coming on for hearing before the court, and a jury im-

pannelled therefor, evidence was offered and given upon the part of the plaintiff and of the defendant, as follows :

The evidence on behalf of the plaintiff tended to show that the plaintiff, a native of Scotland, had come to this country in the fall of 1888, and on the 20th day of November, 1888, was married in the city of New York to one Duncan Campbell, also a native of Scotland.

That upon the 15th day of February, 1889, she started from Chicago to meet her husband in Sioux City, Iowa, taking passage by way of the Chicago, Milwaukee & St. Paul Railroad, and having a first-class ticket of the said railroad company, and also a ticket for a berth in the defendant's sleeping car, running from Chicago to Sioux City.

That on the morning of February 16th, 1889, she, being left alone in the car, was aroused by the porter of the sleeping car coming to her berth, separating the curtains, attempting to take the clothes off the bed, taking her by the arm and attempting to kiss her; that he left after a short time, and again appeared before the berth with his shoes and jacket off, his pantaloons down, and his private parts
48 exposed ; she gathered up her clothes and went to the ladies' toilet, the porter making no resistance; that she locked herself in the toilet-room and remained there about three-quarters of an hour, until the train was nearly to Sioux City.

At this time she was advanced in pregnancy some seven weeks.

Plaintiff further offered testimony tending to show that from the time of her arrival in Sioux City she was nervous and ill, and that in about ten days after her arrival she suffered a miscarriage, there being evidence tending to show that the same might be a result of the alleged assault.

Some ten days after the miscarriage, and about March 10th, 1889, she had recovered sufficiently to be brought down stairs, and walked about the room supported by her husband ; she also went out upon the veranda of the house.

On the evening of March 10th, 1889, she was seized with violent pains; pelvic peritonitis ensued. She was delirious for several weeks, but in June, 1889, was sufficiently recovered to go to Chicago.

In Chicago she was treated by a Doctor Minnaker, whose evidence and the evidence of other physicians called tended to show that at the time Dr. Minnaker first examined her, on the 17th day of June, he found the womb tilted back on the rectum, retroverted. It was swollen to two or three times its usual size. There was a mass of swollen tissue about the fundus of the womb.

At the time of the trial, and just prior thereto, the swelling had become reduced, and the womb had changed its position ; instead of being retroverted it was anteverted, the swelling was reducing gradually, and the adhesions formed about the womb had been somewhat severed and broken up.

The opinion of the physicians called on behalf of plaintiff was that she would never fully recover from the effects of the miscarriage; that she was probably sterile.

49 In a portion of the cross-examination of the plaintiff, Mrs. CAMPBELL, she was examined and testified as follows:

Q. How long did you remain in the toilet-room?
A. About three-quarters of an hour.
Q. What did you then do?
A. I came out.
Q. Where did you then go?
A. I sat in the car.
Q. Where were you when you came out of the toilet-room?
A. What part of the car?
Q. Yes.
A. I really don't know.
Q. You stood up all the time?
A. Yes; I may have sat down when I saw I was not at the depot.
Q. How far were you from the depot?
A. It must have been half an hour. I thought it would not be so long.
Q. Was it light?
A. Yes.
Q. Quite light?
A. Yes.
Q. The sun had risen then?
A. I really don't know about the sun. The train arrived at 8.20.
Q. How much of the time did you sit down?
A. Just for a ——. I was up and down and up and down and could not be still at all. I was weary until the train could come to the depot.
Q. Did you notice as they came into Sioux City?
A. Yes.
Q. Was that through the windows?
A. Yes.
Q. In what position were you then—standing?
A. Standing; yes.
Q. Standing when you came into Sioux City?
A. Yes.
Q. Did any person come into the car while you were standing there?
A. There was a colored negro came in from the dining-room and asked if I would have a cup of coffee or tea.
Q. About what time was that?
A. Well, I was standing watching for the train to come in.

50 Q. You were standing at the time that he came and asked you if you wanted a cup of coffee?
A. Yes.
Q. And that was just as you were coming into the depot?
A. Yes.
A. Did you make any complaint to him?
Q. No; I never said a word.

Q. Was he the only person that came into the car?
A. He was the only one. The other negro was not there at the time.
Q. He was not there?
A. He was not there at that time; at least I did not see him.
Q. That is just as you were coming into the depot?
A. Yes.
Q. You have testified in this case before, have you not, Mrs. Campbell?
A. I have what?
Q. You gave your evidence by deposition in Chicago, did you not, for use in this case before?
A. Not that I am aware of.
Q. Didn't some one take your evidence in writing and swear you to it in Chicago?
A. Yes.
Q. That was before one Hettie C. Watson, do you remember?
A. Yes.
Q. That was about the 8th of March?
A. Yes.
Q. That is your signature to that deposition?
A. Yes.
Q. And it was read over to you beforehand—before you signed it?
A. Yes.
Q. You swore to it there in Chicago?
A. Yes; I did.
Q. In the deposition did you not testify as follows:
"When I succeeded in getting away and out on the floor I ran to the ladies' toilet-room and locked myself in so he could not get hold of me again and stayed there until the train got into Sioux City." Did you not so testify?
A. The way I came out——
A. Answer the question.
A. Yes; if my name is there I did.
Q. Did you not state in Chicago, "I then came out of the
51 ladies' toilet and started to go out of the car and the porter stood between me and the door." You did so testify, did you not?
A. Yes.

That Mr. CAMPBELL, husband of the plaintiff, testified as follows as to his residence:

Q. When did you first know Mrs. Campbell?
A. About 5 or 6 years before I came to America; about 14 or 15 years ago.
Q. When did you come to America?
A. I came to America in 1882—January, 1882.
* * * * * * *
Q. How long do you say you have been employed by the Kerr Thread Co.?

A. I have been employed with them since 1888, with the exception of nine or ten months I was away.

Q. This is an English Co., is it; a Scotch Co. having headquarters in New York?

A. It is a Paisely Co.

Q. Your residence was in Chicago?

A. Yes, sir.

Q. Up until last December?

A. Up until December of last year; yes.

Q. I understood you to say then that you came here and took the place of some man that was compelled to leave on account of illness?

Ans. Yes. There was a Mr. Turbet that lived in Sioux City a number of years, and he worked this ground for the Kerr Thread Co., and he had gone down South for six months.

Q. Did he have a permament leave of absence for six months or was he to go there until he got better?

A. He was sent there for the Kerr Thread Co. to take another ground down South.

Q. Was that for a fixed period of time?

—. ——.

52 Q. You came here to take the place of this gentleman that went South, did you?

A. Yes.

Q. Who went South, as you understood it, temporarily?

A. He went South, I understood, on his own account; and while he was down there the firm gave him some ground to work while he was there.

Q. When you came here you expected to return to Chicago and bring your wife?

A. Yes, sir.

Q. You returned, you say, about the 24th of December?

A. About the 24th of December; yes.

Q. You returned to spend the holidays?

A. Yes.

Q. Then when did you come back to Sioux City?

A. About the 15th or 16th of January.

Q. After your marriage in New York where did you go?

A. We went to Stanton one day, to Brooklyn and New York one day, and the third day we came to Chicago.

Q. How long did you remain in Chicago?

A. I remained in Chicago until about the 5th or 6th of December, and then I was sent out to this part of the State to take the place of another representative of the Kerr Thread Co., who had been given a furlough for his health. I was out here until about the 24th of December, and I returned to Chicago again.

Q. What arrangements did you make at that time as to moving from Chicago?

A. While I was out here I looked for a boarding place. I intended to bring my wife out here and I was going to bring her along.

Q. For what purpose were you coming out here?

A. To travel for the Kerr Thread Co.; to take the place of another representative who had gone South.

53 Q. Were you to make your headquarters here in Sioux City?

A. I was given my headquarters here at that time.

Q. When you was out here in December you made all arrangements for moving here?

A. Yes, sir.

Q. What did you do after going back to Chicago?

A. I stayed at home with my wife until about the 14th or 15th of January—with my wife.

Q. Then what did you do?

A. She went to visit some friends in Michigan she had never seen, and I took her down to the depot on the 14th or 15th and sent her to Michigan and I left for Sioux City.

Q. Then, when did you send for her?

A. She returned to Chicago about nine or ten days afterwards, and I wrote and told her to come out here on the 15th and I would meet her in Sioux City on the morning of the 16th.

In a portion of the evidence of Dr. MINNAKER, upon cross-examination, he testified as follows:

Q. You have testified in this case before, have you not?

A. My deposition was taken; yes.

Q. In that deposition did you make any mention in any way of any swelling apart from the womb itself?

A. I don't remember. I might have said that it was the connective tissue about the womb that was swollen.

Q. Did you mention anything about the swollen condition of the womb?

A. I don't remember that I did.

Q. Did you not state upon that examination as follows: "I examined her on March 3rd, 1890, and found the womb in the

54 same condition as when I first examined her, and the parts about the womb in about the same condition as when I first examined her"?

A. Yes.

Q. Is it not a fact that at the time of this examination on March 3rd you found that the swelling was reduced?

A Yes.

Q. Is it not a fact that in your opinion at that time—at the time of your examination on March 3rd—that the condition of the patient was improving?

A. Yes; to a slight extent; as far as I could make it the swelling was slightly reduced.

Q. And from the history of the case prior to that time and from the history of the case as it had been detailed to you and from the history of the case as it passed under your hands you were then of the opinion, were you not, that these swellings were reducing and the adhesions were breaking up?

A. Slightly; yes.

Q. Now, at that time, in response to the following question "State whether she has been improving since you began doctoring her and her opinion as to her ultimate recovery," did you not say "I cannot say on the whole that she has improved"?

A. Yes, sir; that is what I meant by what I said with regard to the point. I did not have any reference to the reduction of the swelling or anything of the kind, but I considered at the time I gave that deposition that Mrs Campbell was suffering from nervous prostration, and so I think so.

Q. You were not at that time called to say such things as might be favorable to the defendant?

A. No.

55 *Defendant's Evidence.*

The evidence on the part of the defendant tended to show that the plaintiff, Mrs. Campbell, was a passenger upon the car and train, as claimed.

During the afternoon and evening of February 15th Mrs. Campbell seemed nervous and excited, and told the porter she was not accustomed to travelling and had only been in a sleeping car once or twice before.

On retiring she told the porter to call her early in the morning, about six o'clock, as she wanted to see the country. She retired about nine o'clock; her sleep seemed disturbed. The porter several times heard a noise from her berth, and thought that she was dreaming or had nightmare. About fifteen minutes before arriving at Manning the porter, going to call another passenger, found the plaintiff looking out into the aisle with her head through the curtains, and asked her, What is the matter? Have you got the nightmare and cannot sleep? She made no answer, but withdrew her head. About daylight the porter again heard the lady groaning, and fearing that she might be sick or troubled with dreams went to her berth, and pushing the curtains in and touching her arm said, Lady, is anything the matter with you? She suddenly sprang up in the berth, and caused the curtain to fall open on one side, making the exclamation, Oh! He did not put his hands inside the curtain at all or open the curtains at all or look in. He wakened her in the same manner that he always wakened ladies when required to be called early in the morning by pushing the curtains in and touching her, and by speaking and saying, It is time to get up.

After this he did not go near the berth. She rose about six or half-past six and dressed herself and went to the ladies' toilet-
56 room. The porter made up her berth, went to the lunch car and got her lunch, and when he returned to the sleeping car she was sitting in a section quietly.

That while she was seated in the car the brakeman employed about the car passed through the car several times, and saw her sitting there the same as any other passenger, but did not clearly

remember of seeing Mrs. Campbell more than once. She made to him no complaint of any kind.

The *plaintiff* offered to show by the said witness, Edward Whitlock, as follows:

Q. What were your duties in relation to the Pullman sleeper attached to the train?

The plaintiff objects as immaterial. We have no objections to what he did do, but as to his directions.

By the COURT: The material question is as to his presence or where he was that particular morning, not what his habit might have been nor what he might have been directed to do.

Objection sustained; to which defendant duly excepted.

Also as follows:

Q. You were liable to pass through the car at any time, were you not?

A. Yes, sir.

Q. Your duties called upon you to pass frequently to the door and through that car?

A. Yes, sir.

Objected to by plaintiff as immaterial and irrelevant.

By the COURT: The material thing is what in fact he did

The objection is sustained; to which defendant excepts.

Defendant also introduced evidence tending to show that the conductor of the train passed through said car before day-
57 light, but did not see plaintiff, and that the porter of the dining car attached to said train entered said car about an hour before it reached Sioux City, and saw the plaintiff between half-past six and seven o'clock sitting in a section looking out of the window. He asked her if she would like a lunch, and she said, No, I thank you, I will be home soon. There was no agitation in her manner. He saw her get off the train when the train arrived at Sioux City. He was standing on the platform of his car. He saw the porter go out in front of her with her grip in his hand, and he stepped down on the street platform and assisted her off the car. A gentleman met her at the car steps and kissed her, and the porter gave the grip to the gentleman. The lady thanked the porter, bowed to him, and went away.

The time at which he saw the lady in the car was after sun up, between half past six and half past seven.

Defendant asked the following question of the witness, Lyman Beardsley, superintendent of the Sioux City and Dakota divisions of the Chicago, Milwaukee & St. Paul railway:

Q. What are the duties of the brakeman who is at the rear end of the train?

Plaintiff objects as immaterial.

Objection sustained, to which defendant then and there excepted.

Defendant asked of the witness, G. W. Martin, conductor of the train upon which plaintiff was travelling on February 16th, 1889:

Q. What were your duties with reference to passing through the train?

Plaintiff objects. Objection sustained, to which defendant then and there excepted.

58 It was shown by said witness, Martin, that said train reached Sioux City about 8.20 o'clock a. m.; that plaintiff made no complaint of any kind to him; that he went through the train early in the morning from 5.10 to 5.20; that it was his rule to go through between all stations.

The porter charged with the assault was shown to have a good character and to have been always attentive to business.

That in the examination of its expert witnesses the defendant propounded the following hypothetical question:

Q. A woman 26 years of age, strong and healthy, free from any nervous trouble of any kind, is married on the 20th day of November, 1888. Her last menstruation occurs in December, 1888. On the 16th day of February, 1889, she claims that a negro porter on a Pullman sleeper pulled the curtains of her berth aside and took her arm and attempted to kiss it, and afterwards presented himself to her with his privates exposed. She caught up her clothes and went to the toilet-room and remained there three-quarters of an hour. Some ten days thereafter she suffers a miscarriage while attended by a physician. Some ten days after the miscarriage and about March 10th, 1889, she was brought down stairs and walks about the room supported by her husband. She also goes out on the veranda of the house. On the evening of March 10th, 1889, she is seized with violent pains and pelvic peritonitis ensues. She is feverish and delirious, the abdomen becomes tense and hard, the discharges from the womb are not offensive in their character, the inflam-ation greatly subsides, and the adhesions are somewhat absorbed, and the general health somewhat improved. Upon the 25th day of April, 1890, she is examined by a physician and this physician finds there is a swelling back of the womb, push-

59 ing it forward somewhat. The general health of the patient is good. They find the condition as to the menstruation is good and apparently normal; the womb about in its normal condition. They also find a bilateral lasceration of the *os* of the womb. I will ask you, Doctor, whether from the history of the case, as thus detailed, in your opinion, the case presented is one that is incurable in its character?

Objections to hypothetical question:

Plaintiff objects to the question as immaterial, incompetent, and because the statements of facts are not as shown by the evidence and because there is no evidence showing such a state of facts.

By the COURT: My impression is that the question is not admissible. I will hear you on it, but that is my impression at present. In the first place it don't seem to me it is a proper thing to go into

that kind of expert testimony. You have had your physicians who have examined this woman and have given their evidence before the jury. With that kind of evidence before us is it required to extend the rule in order to enable the facts to go before the jury and permit a physician on the stand who has not seen the woman or had an opportunity to examine her to answer a hypothetical question put to him and let him guess? Assuming this to be the truth of the case, I can say in the first place it seems to me there are some gaps in your statement to begin with; then you do not agree. Counsel do not agree and the physicians do not agree about certain facts. Unless you have all there is and there is no disputed fact, it is of no value to have expert testimony on such a question. It is a question for the jury to determine. As a rule that is a thing you cannot call an expert witness to testify to, and you cannot take expert testimony on the issues before the jury. That is one
60 of the fundamental rules. You may take their testimony in regard to certain matters that would throow light on the issues, but I do not think you can ask such a question. It is for the jury to determine. Assuming the woman had such injuries you are asking this witness as to the fact of its continued effect upon her.

By Counsel for Defendant: That is true, but I objected to the hypothetical question of my friend Call this morning because I thought there was certain elements in the question that the evidence did not support. It occurs to me, if your honor please, the suggestion you make would go to the weight or value of the testimony rather than to its competency. Having put a question that is not sustained by the facts in the case the jury will know it. To be sure, one of the ultimate facts, one of the elements in the case, is whether or not this woman's trouble is curable, and an expert might pass an opinion upon it. So in ascertaining the value of real estate in condemnation proceedings experts are required to testify.

By the Court: Experts in such cases are persons who have personal knowledge. You cannot bring a person as a witness who had never seen the real estate and have him swear as to its value. You have to bring a person who knows the land to get his opinion as an expert on the value. You inquire whether he has acquired a knowledge, and having found that he has knowledge you take his opinion. Can you bring a person from Chicago and show that he is in the real estate business in Chicago, and describe a piece of land on the prairie that he has never seen and ask an opinion as to the value.

By Counsel for Defendant: No, your honor, but physical conditions are presumed to be the same in all climes.

61 By the Court: I do not want to keep out anything that can properly go in. There is a very nice difference between real estate and the condition of a patient. We know by practical experience that patients differ. I do not suppose that a physician likes to form an opinion without seeing the patient and getting the assistance his observation gives him in that way and seeing the

characteristics of the patient. We all differ in that regard and that gives him some aid. You have had witnesses who testified from knowledge acquired from examination, after they have had an opportunity to examine her. If you had not been at liberty to avail yourself of that, or if you had no opportunity——

By COUNSEL FOR DEF'T: Have we had an opportunity to examine?

By the COURT: In order to save any question about it I think I will overrule the objection and admit it, and perhaps take an opportunity of expressing my views on such evidence and what I think of such evidence to the jury. My own judgment is that the jury should not give it any consideration at all, and I think I shall so express it to them under the circumstances.

By COUNSEL FOR DEF'T: We do not wish any unusual method; the development of the facts in the case show a certain state of facts to exist——

By the COURT: I mean you have had an opportunity; if this woman had refused to submit herself to examination it would be a different matter. You have had an opportunity, and have had physicians who have had a better opportunity to testify, and it seems to me the jury get all the light they can under that class of testimony.

By COUNSEL FOR DEF'T: If the testimony of all the physicians were concurrent and harmonious——

62 By the COURT: That will never be until the millen-ium comes, and it is doubtful if it will then. That has been my experience.

(Question read to the witness.)

Evidence of physicians was introduced upon the part of the defendant tending to show that the plaintiff would probably recover; that the chances were in favor of her recovery.

Defendant offered, for the purpose of impeaching the plaintiff, Jeannie Campbell, the following statement, taken from her deposition in this case taken prior to the trial of said cause, and filed therein, but not used upon said trial, to wit, "I succeeded in getting away and out on the floor; I ran to the ladies' toilet-room and locked myself in before he could get hold of me again and stayed there until the train got into Sioux City. I then came out of the ladies' toilet and started to go out of the car and the porter stood between me and the door and prevented me from leaving the car until I would promise that I would never report what he had done."

It was admitted by the plaintiff that she had so testified in said deposition.

Defendant offered in evidence articles of agreement between the Pullman Palace Car Company and the Chicago, Milwaukee & St. Paul Railroad Company dated the 22nd day of September, 1882, which said contract is as follows:

Articles of Agreement

Entered into this twenty-second day of September, in the year one thousand eight hundred and eighty-two (1882), between the Chicago, Milwaukee & St. Paul Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, and hereinafter called the Railway Company, party of the
63 first part, and Pullman's Palace Car *Car* Company, a corporation organized and existing under the laws of the State of Illinois, hereinafter called the Pullman Company, party of the second part.

ARTICLE I.

SECTION 1. The railway company, for and in consideration of the several sums of money to it paid, and to be paid, by the Pullman Company, and the covenants and agreements entered into by the said Pullman Company, and set out in the several articles hereof, does hereby sell, assign, transfer and set over to the said Pullman Company, an undivided one-fourth of each of the sleeping cars now being operated on the line of the said railway company, and named as follows: Atlantic, Chicago, Delaware, Dubuque, Hampshire, Illinois, Kilbourn, Madison, Manitoba, Marion, Melbourn, Minneapolis, Minnesota, Minnetonka, Mississippi, Newburg, New York, Niobrara, Oconomowoc, Pacific, Pembino, Red Wing, Sabula, Savanna, St. Paul, Waukesha, Winona, Wisconsin.

SECTION 2. For the undivided fourth of the cars above named, the Pullman Company will pay to the railway company the value, when it is determined under the provisions of this contract, with interest upon their present value, at the rate of six per cent. per annum from the thirtieth day of September, in the year one thousand eight hundred and eighty-two (1882): the said present value to be determined by deducting from their value when repaired and altered, as hereinafter provided, the amount of expenditures which have been made in such repairs and alterations.

The railway company will, at its own expense, make such repairs to and alterations in the cars last above named as it shall deem necessary or desirable, with a view to making them conform, as
64 nearly as practicable, in arrangement and conveniences, to the standard cars in use by the Pullman Company. From time to time as the repairs and alterations are completed, the value of the cars, as they shall then be, shall be determined by agreement of the parties, and in case they cannot agree, by competent persons, one to be appointed by the railway company and one by the Pullman Company, and the third by the persons so appointed, in case of a disagreement between them. The valuation made by the agreement of two of said referees shall be final, and the Pullman Company shall pay to the railroad company one-fourth of the value so determined.

SECTION 3. The railway company, in consideration of said covenants and agreements does hereby let, lease and demise, to the said

Pullman Company, the remaining undivided three-fourths of each of said cars, for a term commencing on the thirtieth day of September, in the year one thousand eight hundred and eighty-two (1882), and continuing until the termination of the contract set out in the third article hereof, either by the election of one of the parties, or by the expiration of the time during which said contract shall otherwise remain in force, as therein provided.

SECTION 4. The railway company covenants with the Pullman Company, that if it, the said railway company, shall demand that sleeping or hotel cars, in addition to those described in the first section of this article, be placed and operated upon its line, or any part thereof, to provide for the requirements of travel, or if it shall become necessary to replace any of said cars with new ones, it, the said railway company, will defray and pay three-fourths the expenses necessarily incurred in the manufacture of such cars.

65 ARTICLE 2.

SECTION 1. Each party shall own an undivided three-fourths and one-fourth respectively of each and every sleeping and hotel car which shall form a part of the regular equipment of sleeping and hotel cars, which shall be used on the line of the railway company, from and after the thirtieth day of September, in the year one thousand eight hundred and eighty-two (1882), including those now used upon said line, described in the first section of the first article hereof, and those which shall hereafter be substituted for or added to those described in said first section.

The undivided three-fourths interest of the railway company in all sleeping or hotel cars so substituted or added shall be included in and covered by the lease and demise made in the third section of the first article hereof.

SECTION 2. The sleeping and hotel cars owned by the parties hereto, jointly, shall be used only on the line of the railway company, except by the consent of its officers, provided that if sleeping-car lines, which shall embrace the line of the railway company and other connecting lines, shall be arranged and operated by said Pullman Company, a *pro rata* proportion of said cars may be operated over the entire length of such sleeping-car line or lines.

SECTION 3. All cars which shall hereafter be substituted for or added to those described in the first section of the first article hereof, while the contract set out in the third article hereof remains in force, shall be manufactured by the Pullman Company.

When any car is completed, and placed upon the line of the railway company, as a part of the regular sleeping-car equipment thereof, the Pullman Company shall render to the railway company, a correct and accurate statement, showing in detail, the actual
66 cost of manufacturing such car, to which ten per centum thereof shall be added, for superintendence and use of fixed capital.

The railway company shall pay upon demand, to the said Pullman Company, three-fourths of the amount shown by such state-

ment, to be the cost of such car, with the ten per centum added, as above provided.

ARTICLE 3.

SECTION 1. The Pullman Company, in consideration of the conveyance and lease set out in the first article hereof, and the covenant and agreements hereinafter set out to be by said railway company kept and performed, hereby covenants and agrees with said railway company, that it will furnish sleeping and hotel cars to said railway company to be used for the transportation of passengers, sufficient to meet the requirements of travel on and over all lines of railway which it now operates, or may hereafter operate under lease, as owner, or otherwise, said cars to be satisfactory to, and accepted by the general manager or general superintendent of said railway company.

SECTION 2. Subject to the provisions hereinafter contained, the Pullman Company shall have the exclusive right, for a term of fifteen (15) years from and after the thirtieth day of September in the year one thousand eight hundred and eighty-two (1882), to furnish for the use of the railway company, such sleeping cars as may be required on all passenger trains of the railway company, over the entire line of railway operated by it, or which may hereafter be operated by it, as owner, lessee, or otherwise, and also on all passenger trains on which it may, by virtue of contracts or running arrangements with other roads, have the right to use such cars.

The railway company will not contract with any other party
67 to run said class of cars on and over said lines of road during the period for which the contract set out in this article remains in force.

Provided, that in all cases in which the railway company may agree to co-operate with another railway company, or companies, in forming through lines of sleeping cars, cars not controlled by the Pullman Company may be run over the lines of this railway company when necessary to secure such co-operation; but in all such cases the Pullman Company shall have the right to furnish from the cars provided to be run under this contract its *pro rata* of the sleeping cars to be used on said co-operative line, and such *pro rata* shall be in the proportion that the mileage of this railway company bears to the entire mileage embraced in any such through co-operative line.

In all sleeping cars operated on such through lines, the Pullman Company shall be entitled to receive all local fares for accommodations therein upon the lines of the ra-lway company, and its *pro rata* of through fares based upon the number of cars furnished by it on such through lines.

It is in like manner agreed that any party holding the right by contract or otherwise, to operate sleeping cars upon the road of any particular railroad company forming a portion of the through line hereinbefore referred to, shall be entitled to receive all local fares and *pro rata* of through fares, for accommodations therein upon the

road of such particular railroad company in any of the sleeping cars operated on said through lines.

Provided, that if the railway company shall agree to co-operate with another railway company or companies over lines on which the Pullman Company then operates its cars, in forming through
68 lines of sleeping cars, the Pullman Company will, as far as permitted by said railway companies, unite in forming and operating such through line or lines upon the basis of local and through fares hereinbefore provided.

SECTION 3. The cars which the Pullman Company shall furnish for use on the line of the railway company shall be so far as the same are sufficient, the cars now operated on its line, and named in the first section of the first article hereof, and from time to time hereafter such additional cars properly equipped and acceptable to the railway company, as may be needed to meet the ordinary requirements of travel. The sleeping and hotel cars which are furnished for the ordinary requirements of travel shall constitute the regular sleeping-car equipment of the line.

SECTION 4. The Pullman Company will keep the equipment for preparing and serving meals, the carpets, upholstery, and bedding, including all work upon the fittings, furnishings and appointments incidental to a sleeping or hotel car, and not essential to an ordinary first-class passenger car, of each of said sleeping and hotel cars, in good and cleanly condition, and will renew and improve the same in both the sleeping and hotel cars, when necessary at its own expense, so far as damage from ordinary wear is concerned and not otherwise, it being mutually understood between the parties hereto, that the cars shall be kept and maintained equal in character and finish to the sleeping and hotel cars of the Pullman Company which shall be in use upon other and competing railroads.

SECTION 5. The Pullman Company, will, at its own expense, provision all hotel cars, and provide for the service of meals and attendance upon passengers in style and quality equal to that upon any first-class Western railroad in the United States; will also furnish upon each sleeping and hotel car one or more employees,
69 as may be needful, whose duty it shall be, on both classes of cars, to prepare the berths or couches for passengers, take proper care and management of the inside of the cars, preserve order and collect berth or couch fares, and on hotel cars, in addition to the above, prepare and serve meals and collect fares for the same. It will also at its own expense, furnish one or more employees who shall have charge of all the sleeping and hotel cars used under this contract.

SECTION 6. The general officers of the Pullman Company, and the employés referred to in the fifth section of this article shall be entitled to free passage over the lines of the railway company, when they are on duty for the Pullman Company.

SECTION 7. The general and division officers and agents of the railway company shall be entitle- to free passes on all the cars furnished by the Pullman Company under this contract.

SECTION 8. The employees of the Pullman Company, referred to

in the fifth section of this article, shall be governed by and subject to the rules and regulations of the railway company, which are or may be adopted from time to time for the government of its own employees; and, in the event of any liability arising against the railway company for personal injuries, death or otherwise, of any employee of the Pullman Company, it is hereby distinctly understood and agreed that the railway company shall be liable only to the same extent it would be if the person injured was an employee in fact of the railway company, and for all liability in excess thereof shall be indemnified and paid by the Pullman Company.

SECTION 9. The railway company will haul the aforesaid cars on its line, embracing all roads which it now controls and operates, or may hereafter control and operate, as a part thereof, by own-
70 ership, lease, or otherwise, on such trains and in such manner as shall, in the judgment of the general manager or general superintendent, be best adapted to accommodate passengers upon the said railways; and will keep the outside of the said cars in good running order and repair, including painting, varnishing, renewal of trucks, and all other parts of the same, except such renewals and repairs as are mentioned in the fourth section of this article, it being understood that the railway company shall repair all damage to said cars of any kind occasioned by casualty or fire, except damages to said cars arising from accident or casualty originating inside thereof, from the imperfect construction or maintenance of the sleeping or hotel car arrangements, or from gross carelessness or willful neglect of the employees of the Pullman Company, which shall be repaired by the Pullman Company.

SECTION 10. The railway company will, at its own expense, furnish and apply the necessary lubricating material, provide ice, fuel and material for lights, and will wash and clean said cars, and, as often as necessary, will renew and replace links and pins, bell-cord and couplings, and couplings for air-brake hose, without charge to the Pullman Company.

SECTION 11. Whenever the revenue from sales of seats and berths equal an average of seven thousand five hundred dollars ($7,500) per car per annum, upon the whole number of cars operated under this contract, then, while such average annual revenue shall continue, the railway company shall not be required to repair any cars operated under this contract, except such repairs as may be occasioned by accidents or casualties, and such as are mentioned in the tenth section of this article, which shall continue to be made by the railway company as therein provided, and if the cars
71 running on that portion of the railway company's line extending from Chicago to Council Bluffs, or on that portion extending from Chicago to Minneapolis and St. Paul, shall at any time earn nine thousand dollars ($9,000) per car per annum, on the average number of cars required to operate such portion or portions of the railway company's line, then, and in that event, the Pullman Company shall bear the expense of all repairs and improvements to said cars, during the time that such average annual gross earnings shall continue as aforesaid, except such repairs as are rendered nec-

essary by accident or casualty, and such as are mentioned in the tenth section of this article, which shall be made by the railway company, as therein provided.

SECTION 12. The railway company will furnish the Pullman Company, without charge, at convenient points, room and conveniences for airing and storing bedding.

SECTION 13. The Pullman Company shall be entitled to collect from each and every person who shall occupy accommodations or receive meals in said cars, such sums for such occupancy or meals as may be usual on other lines, furnishing equal accommodations, and such rules and regulations shall be agreed upon mutually between the parties hereto, as shall most favor the renting of accommodations in said sleeping cars.

No more room in said sleeping cars shall be let to any person or persons than is usually granted to passengers by other railroads which use their own sleeping cars, unless by the assent of the general superintendent of the railway company.

SECTION 14. The right is hereby granted by the railway company to the Pullman Company to place its tickets for seats and berths for sale in such of the railway ticket offices as may be de-
72 sired by the said Pullman Company, and such service shall be performed by, and as a part of the general duties of the ticket agents, and without charge to the Pullman Company; such tickets, and the proceeds of such sales, and neglect of agents, and accidents in respect to same, to be at the risk of the Pullman Company.

SECTION 15. The Pullman Company hereby guarantees the railway company against all damages in respect to the cars furnished under this contract, resulting from gross negligence or improper acts of the employés of the Pullman Company, and from imperfect construction and maintenance of the sleeping or hotel car arrangements, or from any infringements of patent rights in the construction and use of any of the cars which may be used by the Pullman Company upon the lines of the railway company, under this agreement, it being the intent of this section that the Pullman Company shall secure the railway company against all manner of expenditures which may be incurred by it in consequence of any litigations connected with the alleged infringements of patent rights for the interior arrangements of said cars, and that the Pullman Company will pay off and discharge all judgments obtained at any time against the railway company, on account of such infringements, and also all expenditures incurred in repairing damages to said cars, resulting from the gross negligence or improper acts of persons in the employment of the Pullman Company. Patents used in running gear, platforms, brakes, and connections, are to be furnished by the railway company, whenever said patents are specially ordered to conform to the standard of the railway company.

SECTION 16. If either party shall fail to keep and perform its covenants and agreements to cleanse and repair, as provided in these articles, any of the cars furnished and operated under
73 this agreement, then and in that case, after written notice

shall have been given to the defaulting party by the other, of the default complained of, and the said defaulting party shall neglect or refuse so to cleanse or repair said cars, within a reasonable time after such notice, the other party shall have the right to cleanse and make, or cause to be made, all necessary cleansing and repairs to said cars, and said defaulting party shall pay to the other party, the cost of such portion of the cleansing and repairs as said defaulting party is held to be liable for by the terms of this contract.

SECTION 17. The Pullman Company will furnish and operate, for temporary use on said line, sleeping cars in addition to the regular equipment, as may be reasonably required by the railway company to meet special or unusual demands of travel from time to time the Pullman Company to receive the earnings from the letting and sale of sleeping-car accommodations in said cars, and to keep said cars in repair, at its own expense, excepting such extraordinary repairs as may be occasioned by accidents or casualties, and such as are mentioned in the ninth section of this article; also, excepting the repairs and expenditures mentioned in the tenth section of this article, which shall be made by the railway company. The railway company shall also pay to the Pullman Company, the usual charge not exceeding three (3) cents per car per mile run, for such use of said temporary cars. The Pullman Company shall not be required to account for or pay to the railway company any profits arising from the operation of such temporary cars.

SECTION 18. The hotel cars mentioned in the several articles hereof, shall be furnished for use only upon the demand of the railway company, and shall be in number and capacity sufficient
74 to meet the requirements of travel on its lines. They shall contain sleeping accommodations in all respects equal to those on other sleeping cars, and also contain accommodations for furnishing warm meals in said cars to such passengers as may be served thereby. The Pullman Company shall be entitled to charge and collect from passengers the usual fares for the occupancy of the accommodations therein, and may also charge and receive the usual sum for meals which it may furnish thereon for passengers. The said cars will be put on the line, upon reasonable notice to be given by the railway company to the Pullman Company; and in case it shall be thereafter found that the interest of said railway company does not, in its judgment, warrant the use of said hotel cars, that then, and in that case, the said hotel cars, upon reasonable notice by said railway company to said Pullman Company, shall be withdrawn, and such service discontinued, and said hotel cars may be fitted up, at the joint expense in proportion to the ownership of the parties hereto, and run as a part of the regular sleeping-car equipment of the line.

SECTION 19. The said railway company and the said Pullman Company shall each be entitled to three-fourths and one-fourth respectively of all net gains and profits arising from the business to be done by the said Pullman Company, under the provisions of this article. If such business shall result in a loss, they shall contrib-

ute in like proportion to the payment of the same; but it is expressly and distinctly understood that nothing herein contained shall be so construed as to make said companies partners in said business, or to render the said railway company liable to any one for more than three-fourths *three-fourths* of any loss which
75 may result,—the three-fourths of the net profits being reserved by said railway company as rental for the use of the property let and demised, by the first article hereof, to the said Pullman Company.

SECTION 20. For the purpose of settlement between the Pullman Company and the railway company, the operating expenses, which shall be held to include the maintenance of said sleeping and hotel car equipment, all expenses and losses of administration and superintendence, of insurance of the joint property, and other expenses resulting from, or in any way connected with, the operation of said cars, including judgments or payments for injuries to passengers, or loss of their property, shall be deducted from the gross receipts, and three-fourths of the remainder thereof shall be paid by the Pullman Company to the railway company.

Provided, that expenses incurred for patents, or in payment of claims and judgments for the infringement thereof, shall not be so included and deducted; and, provided, further, that when the Pullman Company is required to pay all expenses of repairs, as provided in the eleventh section of this article, the amount of such payments thereof shall be deducted from the gross earnings, with the other expenses above mentioned.

SECTION 21. The Pullman Company shall keep full and complete books of account, showing all expenses, receipts, losses and profits arising from the operation of sleeping and hotel cars on said line, it being undestood and agreed that so much of the general expenses of said Pullman Company shall be added to the specific expenses of the cars running on the lines of the said railway company as the number of cars run bears to the whole number of cars run by the Pullman Company on all the lines operated by it.

The books and papers of the Pullman Company relating
76 to such general expenses, as well as the books of account relating to cars operated over the lines of the railway company, shall be open at all reasonable times to the examination of the said railway company, its officers and agents.

The said books and accounts shall be balanced as often as once in a month, and the profits and losses of said business ascertained, and whatever may be shown thereby shall be borne or paid by or to the party entitled thereto, before the end of the month following.

SECTION 22. In case either of said parties shall at any time hereafter fail to keep and perform any of the covenants herein contained, to be by such party kept and performed, then and in that case, after written notice shall have been given to the defaulting party of the default complained of, if the said defaulting party shall refuse or neglect to make good, keep and fulfill such unfulfilled covenants and conditions of this agreement, within a reasonable time after such notice, the other party shall be at liberty to declare this con-

tract ended, and no longer in force. The railway company reserves the option, and may elect to terminate the contract set out in this article at the end of five (5) years, or at the end of eight (8) years, or at the end of eleven (11) years, from the thirtieth day of September, in the year one thousand eight hundred and eighty-two (1882).

Provided, that if it shall elect to terminate it at any of the above-named periods it shall give notice in writing to the Pullman Company of such election at least six (6) months before the day or days on which it may so elect to have this agreement end.

If the agreement set out in this article is terminated, according to the terms hereof, by the election of the railway com-
77 pany, and without any fault or neglect on the part of the Pullman Company, the railway company shall purchase the undivided interest of the Pullman Company in all sleeping and hotel cars jointly owned by both companies, and pay the fair cash value thereof. If the railway company shall elect to terminate said contract because of the neglect or refusal of the Pullman Company, as herein provided, or the contract shall terminate by expiration of the time for which it is agreed it shall remain in force, the railway company shall have the first right and opportunity to purchase the interest of the Pullman Company in any and all cars thus jointly owned, by paying the fair cash value thereof. In all cases the fair cash value to be paid by the railway company for the interest of the Pullman Company shall, in default of agreement by the parties, be fixed by the decision of arbitrators, as provided in the twenty-fourth section of this article.

A purchase by the railway company shall carry with it the right to use the cars and appurtenances purchased, and such cars as may be used to replace the same, without charge for patent rights which are now or may then be owned by the Pullman Company.

SECTION 23. In case the railway company shall elect to run dining cars upon its line, or any portion thereof, whether in lieu of or in addition to hotel cars, and shall request the said Pullman Company to engage with it in establishing and operating said dining cars, the said last-named company will so engage upon as favorable terms to said railway company as the said Pullman Company makes or shall make with any parallel or competing line using dining cars.

SECTION 24. This contract shall be construed liberally, so as to perfect and secure to each party the privileges and benefits herein provided, or manifestly intended; and if any question as to
78 the proper construction of any of the provisions herein contained or any difference as to any act or duties claimed to be involved in the performance hereof shall arise, if the same cannot be amicably adjusted by and between the parties, it may be submitted to referees to be chosen in the manner following: The party demanding the reference shall serve upon the other party a notice of such demand, stating the question upon which it demands the judgment of the referees, and the name of one referee by it chosen. The party so notified shall, within ten days after receiving such

notice, select a second referee, and notify the other party thereof in writing. The referees so selected shall, within a reasonable time, meet and select a third referee, and fix a time and place for hearing the parties, of which they shall be notified in writing. If any referee shall fail or refuse to act, the party by whom he was chosen shall select another to act in his place. The award of any two of said referees made after hearing the party or parties who have attended in compliance with the notice required to be given, as above stated, shall be final and binding on the parties, and they severally hereby expressly agree to be bound thereby.

In witness whereof, the said railway company hath caused its corporate seal to be attached hereto, attested by its president and secretary, and the said Pullman Company hath caused its corporate seal to be attached hereto, in like manner attested by its president and secretary.

Dated the day and year first above written.

CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.,
(S'g'd) By ALEX. MITCHELL, *Pt.*

79 Attest:
[SEAL.] (S'g'd) P. M. MYERS, *Secretary.*

PULLMAN'S PALACE CAR COMPANY,
(S'g'd) By GEO. M. PULLMAN, *President.*

Attest:
[SEAL.] (S'g'd) A. S. WEINSHEIMER, *Secretary.*

That upon the trial of said cause the court gave the following instructions:

GENTLEMEN OF THE JURY: In this cause now on trial before you the plaintiff, Mrs. Campbell, claims damages against the defendant, The Pullman Palace Car Company, in the sum of twenty thousand dollars for injuries which she claims were caused to her when she was an occupant of a sleeping car furnished by defendant for use as a sleeping car upon a train of passenger cars operated by the Chicago, Milwaukee and St. Paul R'y Company between Chicago, Illinois, and Sioux City, Iowa, such injury being alleged to have been caused by the misconduct of a porter employed by the defendant upon said sleeping car. Before passing to a statement of the particular issues to be submitted to you in this cause it is proper for me to instruct as to the relation existing between the Pullman Company and persons occupying the sleeping cars furnished by the defendant company for the use of the travelling public. As I construe the contract between the defendant
80 and the Chicago, Milwaukee and St. Paul Railway Company, the Pullman Company agrees to furnish for the use of the public what are commonly known as sleeping cars, which, when in use, form part of the trains run by the railway company for the transportation of passengers along its lines of railway. The Pull-

man Company, by thus furnishing cars to be used as sleeping cars by the travelling public, does not assume towards the persons occupying such cars the relation of a common carrier; it does not undertake the duty of transporting passengers to their destination; that duty is assumed by the railway company, and for the performance thereof the passenger must look to the company managing the railroad, and the Pullman Co. is not liable for injuries received by the occupants of its cars from accidents connected with the movement of the train, nor is it responsible for the negligence or misconduct of the persons charged with the duty of operating the train of which the sleeping car may form a part. Whilst, however, it assumes no responsibility for the mere transportation of the persons occupying its cars and does not occupy the relation of common carrier to them, it nevertheless does assume certain duties and obligations to its patrons and becomes bound to the exercise of reasonable care in the performance thereof.

The Pullman Company, by its mode of managing their sleeping cars, represents to the travelling public that they may be occupied with reasonable safety and comfort as sleeping cars, and by receiving payment for the use thereof the company agrees with its patrons that it will exercise ordinary care to secure the comfort and safety of those using the same for the purposes for which such cars are furnished.

The person or persons placed in charge of such sleeping cars by the Pullman Company is bound, as the employee of the com-
81 pany, to the exercise of ordinary care for the protection and comfort of persons using such car in accordance with the regulations of the company, and if such person, either through failure to exercise proper care or by willful misconduct on his part, permits or causes an injury to happen to an occupant of a sleeping car placed under his charge the Pullman Company will be liable for the damages caused thereby.

In the answer filed in this cause the defendant admits that on the 15th and 16th days of February, 1889, it was engaged in operating a sleeping car on the line of the Chicago, Milwaukee and St. Paul R'y Company between Chicago, Ill., and Sioux City, Iowa, in connection with the regular passenger train, reaching Sioux City in the morning, and admits, also, that the plaintiff was a passenger upon the passenger train in question, and had purchased and paid for a ticket from defendant for a seat and berth in said sleeping car belonging to the defendant.

There is no conflict in the testimony adduced by the parties, plaintiff and defendant, touching the fact that the plaintiff was an occupant of the sleeping car which left Chicago on the 15th and reached Sioux City on the morning of the 16th of February, 1889. It thus appears that the plaintiff was rightfully an occupant of said sleeping car at the time named, and while in said car, while it was being conveyed to Sioux City, the plaintiff was entitled to demand of defendant the exercise on its part of ordinary care to secure to her the safe and comfortable use of said sleeping car and its

conveniences for the purpose for which said car was placed in said train.

In the performance of its duties in this respect the defendant company would be responsible for the willful misconduct, if
82 any there was, of its own employees placed in charge of said sleeping car, when such misconduct was of such a nature as to interfere with the safe and comfortable use of said car by the plaintiff for sleeping-car purposes.

On the part of plaintiff it is charged that the porter employed by defendant and placed in said car did, on the morning of said 16th day of February, 1889, between the stations of Manilla and Sioux City, make an indecent assault upon plaintiff whilst she was occupying the berth assigned to her, placing his hands upon her person, making indecent proposals to her, and exposing his person to her.

On — part of defendant it is denied that the porter did thus misconduct himself; that whilst it is true the porter did go to plaintiff's berth, he did so for the purpose of arousing her from an uneasy sleep, and awakened her in the usual manner, and that plaintiff, not being accustomed to travelling upon sleeping cars nor to the sight of colored persons in close proximity to her, and being thus aroused, may have been rendered somewhat nervous and frightened, and has thus been led to misconstrue the action and purpose of the porter in going to her berth.

If, in fact, the porter on said car did act toward the plaintiff in the manner charged by the plaintiff, such conduct on his part would unquestionably be a violation of the duty due and owing from the defendant to the plaintiff whilst she was an occupant of said sleeping car. The pivotal point in the case, gentlemen, is this question of fact, which you are called upon to decide. In determining this question you will be required to consider the credibility of the witnesses and the weight to be given to their testimony. In considering these questions you will take into account the
83 pecuniary or other interest, if any, which a given witness may have in the result of the case or the absence thereof, the appearance of the witness, if brought before you, the manner of his testifying, his means of knowledge, and whether his testimony is corroborated or the contrary by the admitted or proven facts of the case.

For the purpose of attacking the credibility of witnesses it is permitted to either party to show that a given witness has made at other times statements contradicting some material part or portion of his testimony, the proper foundation therefor being first laid.

In considering impeaching testimony of this character the jury should be careful to distinguish between such discrepancies and statements made at different times by a witness touching a given fact or transaction as may naturally arise from the usual imperfections of the human memory and those which indicate an intention on the part of the witness to prevaricate and mislead. It is only those of the latter character that have weight as matter of impeachment.

The burden of the issue is upon the plaintiff, and she must satisfy you by a fair and reasonable preponderance of the evidence that, in fact, the porter in charge of such sleeping car was guilty of the misconduct charged against him before she can ask a verdict at your hands.

If the plaintiff has failed to satisfy you by a fair and reasonable preponderance of the evidence that the porter did commit the act or misconduct alleged against him, then she has failed to make out her case, and your verdict must be for the defendant.

84 On the other hand, if, by a fair and reasonable preponderance of the evidence, you are satisfied that the porter in charge of said car was guilty of the alleged acts of misconduct towards the plaintiff, then your verdict should be for the plaintiff.

What, then, gentlemen, do you find the fact to be in this particular? Was or was not the porter guilty of the acts of misconduct alleged against him by the plaintiff?

You have heard the evidence adduced on behalf of the plaintiff, including her own testimony, giving the plaintiff's version of what occurred on the sleeping car on the morning of Feb. 16 as it came from Manilla to Sioux City. You have likewise heard the evidence adduced on behalf of the defendant, including the testimony of the porter, giving the defendant's version of what occurred upon that occasion.

You have heard the evidence adduced by both parties touching plaintiff's arrival at Sioux City, the meeting her husband, going to a hotel and thence to a boarding-house kept by Mrs. Fuller; touching the complaints made by plaintiff of the fright alleged to have been caused her; touching the physical condition of plaintiff; touching the complaint made by plaintiff's husband to the railway superintendent; touching the interviews had between plaintiff's husband, the railroad superintendent, and others, and all other matters introduced by both parties with the intent to throw light upon this the main issue involved in the case.

Counsel for the respective parties have, in their arguments before you, presented the views taken by each party of the facts of the case and of the conclusions of fact they seek to deduce from the evidence submitted to you.

85 It is for you to calmly, dispassionately, and impartially consider the entire evidence thus submitted to you and from it determine what the truth is upon this issue of fact between the parties.

If, upon due consideration of the case, you find that the porter employed upon the sleeping car was in fact guilty of the misconduct alleged against him by the plaintiff, then your verdict should be for the plaintiff; but, on the other hand, if the evidence by a fair and reasonable preponderance thereof fails to satisfy you that he was guilty of such alleged misconduct, then your verdict should be for the defendant.

If upon this issue you find for the plaintiff you will then be required to assess the damages to be awarded the plaintiff.

What the plaintiff is entitled to in case you find in her favor is

fair pecuniary compensation for the injuries naturally and immediately resulting from the outrage and wrong inflicted upon her.

She is entitled to be compensated for the mental and physical pain and suffering, if any, caused to her at the time and which she has since suffered as the direct consequence of the wrong done her.

On the part of the plaintiff it is claimed that when she went upon the sleeping car she was in a pregnant condition; that the assault upon her brought on a miscarriage, which occurred within a few days after she reached Sioux City; that from the time she reached Sioux City she was suffering and ill, caused by the wrong done her, and that she is still suffering in her health and strength as a consequence thereof, and that she has been probably rendered barren, and that she is not likely ever to fully recover from the injurious effect resulting to her from the wrongs complained of.

On the part of the defendant it is denied that such injuries were caused to the plaintiff; that whilst it may be true she suffered
86 a miscarriage, it was caused by plaintiff's own negligence and want of proper care when she was recovering from the first illness and from her improperly exposing herself at that time.

If the plaintiff, through her own want of care and failure to exercise ordinary prudence and foresight, aggravated the injuries under which she was at that time suffering and thereby caused the miscarriage, she cannot hold the defendant responsible therefor, as such result would then be due to her own negligent conduct.

Now, gentlemen, you have heard the evidence adduced by both parties on this question, including the evidence tending to show the condition of plaintiff immediately following her arrival in Sioux City, and what her condition was and what she did up to the time the miscarriage took place, together with the testimony of the physicians touching her condition and the causes of miscarriage, and from the entire evidence it is for you to say what the cause of the miscarriage was.

If you find that it was caused by the wrong done the plaintiff upon the sleeping car, then the plaintiff is entitled to be compensated for the suffering caused her thereby and for any injurious effects, temporary or permanent, caused thereby to the person, health, and strength of plaintiff.

Briefly restated, the plaintiff, if entitled to recover against the defendant, is entitled to be fairly compensated for all injuries, temporary or permanent, directly caused to the plaintiff in her person, health, and strength by the wrong done her, including compensation for the pain and suffering, mental and physical, which has been caused or may hereafter be caused to the plaintiff by reason of the wrong suffered by the plaintiff.

87 The ascertainment of the amount to be awarded as compensation for such injuries as you find the plaintiff is entitled to recover for is of necessity entrusted to the sound common sense and good judgment of the jury.

The case, gentlemen, is in your hands. Give it the consideration it deserves, and render the verdict which your impartial judgment

approves as the proper response to the evidence submi
and the instructions given to you by the cou

To each and all of which said charges and instructions
each and every paragraph thereof defendant then and there duly excepted.

As a part of the foregoing charge, the court, of its own motion, gave the following instruction, to wit:

"For the purpose of attacking the credibility of witnesses it is permitted to either party to show that a given witness has made at other times statements contradicting some material part or portions of his testimony, the proper foundation therefor being first laid. In considering impeaching testimony of this character the jury should be careful to distinguish between such discrepancies in statements made at different times by a witness touching a given fact or transaction as may naturally arise from the usual imperfections of the human memory and those which indicate an intention on the part of a witness to prevaricate and mislead. It is only those of the latter character that have weight as matter of impeachment."

To which said instruction the defendant then and there duly excepted.

88 The defendant asked the following fifteen instructions, but the court refused to give them or any of them; to which refusal as to each of said instructions the defendant then and there duly excepted:

1st. You are instructed that the present action is one brought upon an express contract, and that every material allegation relating to said contract must be proven by the plaintiff before she can recover; unless, therefore, she has proven to your satisfaction that under said contract she was entitled to the care, attention, and protection of the defendant company and its employees, the plaintiff cannot recover.

Refused. To which refusal the defendant then and there excepted.

2nd. The plaintiff having refused to produce the contract between herself and the defendant, and having failed to show what that contract was or what obligations it imposed upon the defendant, you are instructed that the obligation to provide for the safety and security of plaintiff or her immunity from insult and injury is not to be inferred from the purchase or possession of defendant's ticket, and defendant therefore is not liable in this action.

Refused. To which refusal the defendant then and there duly excepted.

3rd. You are instructed that this action is based upon an express contract with the plaintiff; that before she can recover anything she must prove by a preponderance of the evidence that the said defendant has broken the said contract, and if you find that the said contract was broken by the said defendant, then plaintiff can recover only the actual damages resulting therefrom,

89 and cannot recover any damages to punish defendant or such as are in law called exemplary damages.

Refused. To which refusal the defendant then and there duly excepted.

4th. You are instructed that the plaintiff having failed to establish and prove by the evidence the contract set out in the second paragraph of the petition she cannot recover in this action.

Refused. To which refusal the defendant then and there duly excepted.

5th. You are instructed that an employer is not liable for a willful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve the purpose of his employer by the willful act; and if you find that the alleged assault was not made with the purpose to serve the defendant company, then you should find for the defendant.

Refused. To which refusal the defendant then and there duly excepted.

6th. You are instructed that the defendant is not responsible in this action for a malicious assault made by the porter of its sleeper while he was not engaged in the performance of his duties as such porter and when said assault was not made for the purpose of serving said defendant by his willful act; and if you shall find in this case that the alleged assault was not made by the porter while engaged in the performance of his duties, then you should find for the defendant.

Refused. To which refusal the defendant then and there duly excepted.

7th. You are instructed that if the act of the porter was not necessary to the performance of the service of the defendant and was not intended for that purpose, but was committed, if
90 committed at all, only to gratify his own lust, then the act was not within the scope of his employment and the defendant is not liable therefor.

Refused. To which refusal the defendant then and there duly excepted.

8th. You are instructed that if the defendant is liable at all it is liable only for the direct and immediate consequences of whatever breach of contract may have occurred and only for such damages as were fairly within the contemplation of the parties when the contract was made. The defendant is not liable for any damages resulting from the peculiar condition of the plaintiff, such condition not having been made known to the defendant and the contract not having been made with reference thereto. If you shall find that the plaintiff was in a pregnant condition, that such condition was not made known to the defendant and did not enter into the contemplation of the parties to the contract, then defendant is not responsible for any damages resulting specially from such pregnancy.

Refused. To which refusal the defendant then and there duly excepted.

9th. You are instructed that if plaintiff passed through her miscarriage and was recovering therefrom, and that by her imprudence and negligence she brought upon herself the inflam-ation from

which resulted the lasting injuries of which she now complains, then the defendant should not be held responsible for the lasting injuries.

Refused. To which — the defendant then and there duly excepted.

10th. You are instructed that defendant is responsible, if
91 responsible at all, for such injuries only as are the direct consequences of the wrong complained of and is not responsible for such injuries as may afterwards have resulted from her own imprudence and negligence.

Refused. To which refusal the defendant then and there duly excepted.

11th. You are instructed that under the contract between Pullman Palace Car Co., the defendant, and the C., M. & St. P. R. R. Co. the porter of the sleeping car attached to the train of said railroad company upon which plaintiff was riding on the 16th of February, 1889, was the servant of said railway company in all respects save as to such matters as pertained to the arrangements peculiar to a sleeping car, and was under the direction and control in all matters, including the protection of passengers from insult and injury, and you should therefore find for the defendant.

Refused. To which refusal the defendant then and there duly excepted.

12th. You are instructed that if you find from the evidence that the porter who is charged with having committed the assault upon the plaintiff was not at that time under the direction and control of the defendant, but was, in fact, acting under the control of the Chicago, Milwaukee & St. Paul R. R. Co. in all matters relating to the protection of passengers from insult and injury, then he was not the servant of the defendant relating to such matters and defendant is not responsible for the assault, if any, made by him.

Refused. To which refusal the defendant then and there duly excepted.

13th. If the porter charged with the assault was under the direction of the C., M. & St. P. R'y Co., and the proper employees
92 of the latter road had the right to direct and control him in all matters save those relating to the care of what pertained exclusively to a sleeping car, then the railway company is responsible for any assault he may have made upon the plaintiff, and defendant is not liable in this action.

Refused. To which refusal the defendant then and there duly excepted.

14th. You are instructed that if the porter who is charged with making the assault was furnished by the defendant to the Chicago, Milwaukee & St. Paul R'y Co. under the contract offered in evidence, and was thereunder subject to the control and direction of said railroad company and not of defendant, then you should find for the defendant.

Refused. To which refusal the defendant then and there duly excepted.

15th. The responsibility of the railway company for the safety

and security of its passengers is not diminished by the fact that the same passengers may have contracts with the sleeping-car company for the accommodations upon its cars. The duty of the sleeping-car company is to provide the arrangements peculiar to their cars, while the duty of the railroad company is to see that passengers on such cars constituting a part of its trains shall be protected from insult and injury: and for any failure to so protect, them it, and not the sleeping-car company, is liable.

Refused. To which — the defendant then and there duly excepted.

Which was all the charge and instructions given by the court to the jury, and also all the instructions asked by defendant and refused to be given by the court.

93 That on May 10th, 1890, the jury in said cause returned a verdict against the defendant for the sum of eleven thousand dollars.

That upon the same date the defendant was duly given until the the second day of the October term, 1890, of this court to settle and file a bill of exceptions in said cause.

That on the 17th day of May, 1890, defendant filed its motion for a new trial and assigned as reasons therefor:

1st. That the verdict of the jury is contrary to the evidence.

2nd. That the verdict of the jury is contrary to the instructions of the court.

3rd. That the amount of the verdict is excessive.

4th. That the court erred in making in the presence of the jury certain remarks as to the evidence offered by the defendant for the purpose of showing the good character of the porter, Albert Cæsar, a copy of which remarks is hereto attached, marked Exhibit "A" and made a part hereof. That such remarks were of such a nature as to destroy the value of said evidence and make it worthless before the jury.

5th. That the court erred in making certain remarks in the presence and hearing of the jury when the defendant propounded to its expert witness, Dr. R. E. Conniff, its hypothetical question, and the remarks of the court thereon are hereto attached, marked Exhibit "B" and made a part hereof; that said remarks entirely destroyed the weight and effect of said evidence and of all of defendant's expert evidence before the jury.

6th. That the court erred in giving the following instruction: "For the purpose of attacking the credibility of witnesses it is permitted to either party to show that a given witness has made at other times statements contradicting some material part or

94 portions of his testimony, the proper foundation therefor being first laid. In considering impeaching testimony of this character the jury should be careful to distinguish between such discrepancies in statements made at different times by a witness touching a given fact or transaction as may naturally arise from the usual imperfections of the human memory, and those which indicate an intention on the part of the witness to prevaricate and mislead. It is only those of the latter character that have

weight as impeachment." Said instruction being misleading in that it excludes from the effect of impeachment the showing of infirmity of memory on the part of the witness and the incredibility of his statements owing to such infirmity.

7th. That the court erred in refusing the instructions requested by the defendant, numbers 1 to 15, and each of said instructions.

Defendant further moves the court to arrest judgment herein and to dismiss said cause or remand the same to the State court and for grounds thereof states:

1. That it appears affirmatively from the evidence in said cause that the plaintiff, Jeannie Campbell, was not a citizen of the State of Iowa at the time of beginning said action nor at the time of the removal thereof, and has at no time been a citizen of said State, and that this court is without jurisdiction of said cause.

2. That it appears affirmatively from the evidence that at the time of beginning said action and at all times since the said plaintiff has been and is a citizen of the State of Illinois, of which State defendant is also a citizen.

95 (EXHIBIT "A.")

Q. What has been the character of that porter so far as you have been connected with him?

A. First class.

By COUNSEL FOR PLAINTIFF: That is objected to as immaterial and incompetent and assuming that the character of this porter is in evidence in any way to show that he did not commit the offense, and we ask to have the answer excluded. If the charge was that the company was negligent in employing its men, the evidence would not be immaterial; but that is not the allegation.

By the COURT: That is the way it strikes my mind. Now, as to illustrating the question of practice in criminal cases, it is well understood that in certain criminal cases the person may put his previous good character in evidence before the jury for such consideration as they deem proper in view of all the evidence in the case. A person's good character is evidence in his favor in certain classes of crimes. The query is whether that comes to be material in cases of this kind. This is a suit between Mrs. Campbell and the Pullman Palace Car Co. The character of the Pullman Palace Car Co. is not in question at all. You have a witness by the name of Cæsar. You are trying to prove his good character. It is a fact he is a very material witness, because it is claimed he committed the act complained of. It is conceded this case is neither for nor against him. If the issue is strictly as to negligence and whether the Pullman Palace Car Co. had been negligent in selecting the proper sort of men, then this evidence would be competent, I think.

By COUNSEL FOR DEF'T: If our friends claim we are liable only for breach of contract, then I submit the testimony is not competent.

96 By COUNSEL FOR PLAINTIFF: The petition shows what we claim. It is a tort growing out of a contract—a wrongful breach of it in the assault—no allegation that the company were negligent in employing its men, but simply by a breach of their contract to carry the plaintiff safely.

By the COURT: It don't seem to me to be material; but I do not want to make a ruling that might be error and thereby have an error that might work a reversal. It strikes me that it is immaterial. The allegation is, Did he in this particular instance do wrong?

By COUNSEL FOR PLAINTIFF: After consultation we desire to withdraw the objection.

(EXHIBIT "B.")

(Being the same question and remarks appearing on pages 12 to 16, inclusive, of this bill.)

That on the 7th day of July, 1890, the court overruled said motion; to which defendant duly excepted.

That on the first day of July, 1890, the plaintiff filed motion for judgment upon verdict; which said motion was sustained on the 7th day of July, 1890, and judgment was rendered in said cause against the defendant for the sum of eleven thousand dollars; to which said judgment defendant then and there duly excepted.

And now, on this 7th day of October, A. D. 1890, defendant presents this its bill of exceptions and asks that the same may be made a part of the record in said cause, which is done accordingly.

O. P. SHIRAS, *Judge.*

97 [Endorsed:] Filed Oct. 7th, 1890. A. J. Van Duzee, c'l'k. J. H. Bolton.

98 *Law Certificate.*

UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

I, A. J. Vanduzee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify that the foregoing is a full, true, and perfect transcript of the record and proceedings in the case of Jeannie Campbell, plaintiff, *vs.* Pullman's Palace Car Co., defendant, No. 132, law, as fully as the same remain on file and of record in my office.

Seal Circuit Court U. S., Northern District of Iowa, Sioux City.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at Sioux City, in the said district, this 14th day of Oct., A. D. 1890.

A. J. VAN DUZEE, *Clerk,*
By J. H. BOLTON, *D'p'ty.*

99 And afterwards, to wit, Oct. 7th, A. D. 1890, the same being the 1st day of the regular October term, A. D. 1890, of said court, the following proceedings were had in said cause by said court and duly entered of record, to wit:

JEANNIE CAMPBELL
vs.
PULLMAN'S PALACE CAR CO } No. 132. Law.

Now, at this term, Oct. 7th, it being on the first day of the regular October term, 1890, of this court, came the parties hereto, the plaintiff appearing by her attorneys, Joy, Hudson, Call & Joy, and the defendant appearing by its attorneys, E. H. Hubbard & Jno. S. Runnells, and defendant presented to the court for examination and approval the bill of exceptions prepared in said cause.

And the court having heard and duly considered the same and heard the argument of counsel thereon, the said bill of exceptions was thereupon approved by the court and duly signed and filed and made a part of the record in said cause as the final and full bill of exceptions in said cause as by the law in such case made and provided.

Read, approved, and signed in open court by—

O. P. SHIRAS, *Judge.*

100 In the Circuit Court of the United States, Northern District of Iowa, Western Division.

JEANNIE CAMPBELL, Plaintiff,
vs.
PULLMAN'S PALACE CAR COMPANY, Defendant.

To the Honorable O. P. Shiras, judge of said court:

Now comes the Pullman's Palace Car Company, the defendant above named, by E. H. Hubbard, its attorney, and complains that in the records and proceedings and also in the rendition of judgment in a suit between Jeannie Campbell, plaintiff, and said Pullman's Palace Car Company, defendant, tried in the circuit court of the United States, in said northern district of Iowa, at the May term thereof, A. D. 1890, and in which judgment was rendered against it on the 7th day of July, A. D. 1890, manifest error hath intervened to the great damage of the said defendant—

Wherefore defendant prays for the allowance of a writ of error and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

E. H. HUBBARD,
Attorney for Defendant, Plaintiff in Error.

Upon examination of the foregoing petition it is this day ordered that the writ of error therein prayed for be allowed.

Dated this 9th day of September, A. D. 1890.

O. P. SHIRAS, *Judge.*

[Endorsed:] Filed Sept. 10th, 1890. A. J. Van Duzee, cl'k, by J. H. Bolton, d'p'ty.

101 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States, in and for the northern district of Iowa, Greeting:

Because that in the records and process, and also in the rendering of judgment in a suit before you, between Pullman's Palace Car Company of Cook county, Ill., plaintiff in error, and Jeannie Campbell, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as in his complaint has been stated, and as it is just and proper that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded that if judgment be therein given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning the same, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the second Monday of October next, at Washington, in the said Supreme Court.

That the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 9th day of September, in the year of our Lord one thousand eight hundred and ninety.

[Seal Circuit Court U. S., Northern District of Iowa.]

A. J. VAN DUZEE,
Clerk of the Circuit Court of the United States in and for the Northern District of Iowa.

The foregoing writ is allowed by—

O. P. SHIRAS, *Judge.*

[Endorsed:] Filed Sept. 10th, 1890. A. J. Van Duzee, cl'k. J H. Bolton, d'p'ty.

102 UNITED STATES OF AMERICA, *ss:*

To Jeannie Campbell, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the northern district of Iowa and the western division thereof, wherein Pullman's Palace Car Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not

be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable O. P. Shiras, judge of the said circuit court, this 9th day of September, in the year of our Lord one thousand eight hundred and ninety.

O. P. SHIRAS, *Judge.*

We do hereby accept and acknowledge due complete and legal service on us, for Jeannie Campbell, defendant in error, of the foregoing citation in Sioux City, Woodbury county, Iowa, this 10th day of September, A. D. 1890.

JOY, HUDSON, CALL & JOY,
Attorneys for Jeannie Campbell, Defendant in Error.

[Endorsed:] Filed Sept. 10th, 1890. A. J. Van Duzee, cl'k, by J. H. Bolton, d'p'ty.

103 In the Circuit Court of the United States in and for the Northern District of Iowa.

JEANNIE CAMPBELL
vs.
PULLMAN PALACE CAR COMPANY. } Assignment of Errors.

Now comes the defendant in the above-entitled action and alleges that the court, upon the trial thereof, committed the following manifest errors, to wit:

1st. That the court erred in excluding the evidence of the witness Edward Whitlock, brakeman, as to his duties with relation to the Pullman sleeper, and in sustaining the objections of plaintiff to defendant's questions with reference thereto, addressed to said witness, said questions, objections, and rulings being as follows:

Q. What were your duties in relation to the Pullman sleeper attached to the train?

The plaintiff objects as immaterial. We have no objections to what he did do, but as to his directions.

By the COURT: The material question is as to his presence or where he was that particular morning, not what his habit might have been nor what he might have been directed to do.

Objection sustained; to which defendant duly excepted.

Q. You were liable to pass through the car at any time, were you not?

A. Yes, sir.

Q. Your duties called upon you to pass frequently to the door and through that car?

A. Yes, sir.

Objected to by plaintiff as immaterial and irrelevant.

104 By the COURT: The material thing is what in fact he did. The objection is sustained.

To which defendant excepts.

2nd. That the court erred in sustaining plaintiff's objection to the following question, addressed to Lyman Beardsley, as follows:

Q. What are the duties of the brakeman who is at the rear end of the train?

Plaintiff objects as immaterial.

Objection sustained; to which defendant then and there excepted.

3rd. That the court erred in sustaining objection to question of defendant to G. W. Martin as follows:

Defendant asked of the witness G. W. Martin, conductor of the train upon which plaintiff was travelling on February 16th, 1889:

Q. What were your duties with reference to passing through the train?

Plaintiff objects. Objection sustained; to which defendant then and there excepted.

4th. That the court erred in making in the presence and hearing of the jury the following remarks upon the hypothetical question propounded by defendant to the expert witness, said question and remarks being as follows:

That in the examination of its expert witnesses the defendant propounded the following hypothetical question:

Q. A woman 26 years of age, strong and healthy, free from any nervous trouble of any kind, is married on the 26th day of November, 1888, her last menstruation occurs in December, 1888. On the 16th day of February, 1889, she claims that a negro porter on a Pullman sleeper pulled the curtains of her berth aside and took her arm and attempted to kiss it, and afterwards presented himself to her with his privates exposed. She caught up her clothes and went to the toilet-room and remained there three-quarters of an hour. Some ten days thereafter she suffers a miscarriage while attended by a physician. Some ten days after the miscarriage, and about March 10th, 1889, she was brought down stairs and walked about the room supported by her husband; she also goes out on the veranda of the house. On the evening of March 10th, 1889, she is seized with violent pains and pelvic peritonit*is* ensues; she is feverish and delerious; the abdomen becomes tense and hard; the discharges from the womb are not offensive in their character; the inflam-ation greatly subsides and the adhesions are somewhat absorbed and the general health somewhat improved. Upon the 25th day of April, 1890, she is examined by a physician, and this physician finds there is a swelling back of the womb, pushing it forward somewhat; the general health of the patient is good; they find the condition as to the menstruation in good and apparently normal condition, the womb about in its normal condition; they also find a bilateral lasceration of the *os* of the womb. I will ask you, Doctor, whether from the history of the case as thus detailed, in your opinion, the case presented is one that is incurable in its character.

105

Objections to hypothetical question:

Plaintiff object- to the question as immaterial, incompetent, and because the statements of facts are not as shown by the evidence, and because there is no evidence showing such a state of facts.

By the COURT: My impression is that the question is not admissible. I will hear you on it, but that is my impression at present.

In the first place, it don't seem to me it is a proper thing to go into that kind of expert testimony. You have had your physicians
106 who have examined this woman and given their evidence before the jury. With that kind of evidence before us, is it required to extend the rule in order to enable the facts to go before the jury, and permit a physician on the stand who has not seen the woman or had an opportunity to examine her to answer a hypothetical question put to him and let him guess? Assuming this to be the truth of the case, I can say in the first place, it seems to me there are some gaps in your statements to begin with; then you do not agree. Counsel do not agree and the physicians do not agree about certain facts. Unless you have all there is, and there is no disputed fact, it is of no value to have expert testimony on such a question. It is a question for the jury to determine. As a rule that is a thing you cannot call an expert witness to testify to, and you cannot take expert testimony on the issues before the jury; that is one of the fundamental rules. You may take their testimony in regard to certain matters that would throw light on the issues, but I do not think you can ask such a question. It is for the jury to determine. Assuming that the woman had such injuries, you are asking this witness as to the fact of its continued effect upon her.

By COUNSEL FOR DEFENDANT: That is true; but I objected to the hypothetical question of my friend Call this morning because I thought there was certain elements in the question that the evidence did not support. It occurs to me, if your honor please, the suggestion you make would go to the weight or value of the testimony rather than to its competency. Having put a question that is not sustained by the facts in the case the jury will know it. To be sure, one of the ultimate facts, one of the elements in the case, is whether or not this woman's trouble is curable, and an expert might pass an opinion upon it. So in ascertaining the value of real estate in condemnation proceedings experts are required to testify.

107 By the COURT: Experts in such cases are persons who have personal knowledge. You cannot bring a person as a witness who had never seen the real estate and have him swear as to its value. You have to bring a person who knows the land to get his opinion as an expert on the value. You inquire whether he has acquired a knowledge, and having found that he has a knowledge you take his opinion. Can you bring a person from Chicago and show that he is in the real estate business in Chicago and describe a piece of land on the prairie that he has never seen and ask an opinion as to the value?

By COUNSEL FOR DEFENDANT: No, your honor; but physical conditions are presumed to be the same in all climes.

By the COURT: I do not want to keep out anything that can properly go in. There is a very nice difference between real estate and the condition of a patient. We know by practical experience that patients differ. I do not suppose that physicians like to form an opinion without seeing the patient and getting the assistance his observation gives him in that way and seeing the characteristics of the

patient. We all differ in that regard, and that gives him some aid. You have had witnesses who testified from knowledge acquired from examination after they have had an opportunity to examine her. If you had not been at liberty to avail yourself of that, or if you had no opportunity——

By COUNSEL FOR DEFENDANT: Have we had an opportunity to examine?

By the COURT: In order to save any question about it I think I will overrule the objection and admit it, and perhaps take an opportunity of expressing my views on such evidence and what I think of such evidence to the jury. My own judgment is that the jury should not give it any consideration at all, and I think
108 I shall so express it to them under the circumstances.

By COUNSEL FOR DEF'T: We do not wish any unusual method. The development of the facts in the case show a certain state of facts to exist——

By the COURT: I mean you have had an opportunity. If this woman had refused to submit herself to examination it would be a different matter. You have had an opportunity and have had physicians who have had a better opportunity to testify, and it seems to me the jury get all the light they can under that class of testimony.

By COUNSEL FOR DEF'T: If the testimony of all the physicians were concurrent and harmonious——

By the COURT: That will never be until the millenium comes, and it is doubtful if it will then. That has been my experience.

5th. That the court erred in giving to the jury the following portion of its charge:

"The Pullman Company, by its mode of managing their sleeping cars, represents to the travelling public that they may be occupied with reasonable safety and comfort as sleeping cars, and by receiving payment for the use thereof the company agree with its patrons that it will exercise ordinary care to secure the comfort and safety of those using the same for the purposes for which such cars are furnished.

"The person or persons placed in charge of such sleeping cars by the Pullman Company is bound, as the employee of the company, to the exercise of ordinary care for the protection and comfort of the persons using such car in accordance with the regulations of the company, and if such person, either through failure to exercise proper care or by willful misconduct on his part, permits or causes an injury to happen to an occupant of a sleeping car placed
109 under his charge, the Pullman Company will be liable for the damages caused thereby."

6th. That the court erred in giving to the jury the following portion of its charge:

"There is no conflict in the testimony adduced by the parties plaintiff and defendant touching the fact that the plaintiff was an occupant of the sleeping car which left Chicago on the 15th and reached Sioux City on the morning of the 16th of February, 1889. It thus appears that the plaintiff was rightfully an occupant of said

sleeping car at the time named, and while in said car, while it was being conveyed to Sioux City, the plaintiff was entitled to demand of defendant the exercise on its part of ordinary care to secure to her the safe and comfortable use of said sleeping car and its conveniences for the purpose for which said car was placed in said train.

"In the performance of its duties in this respect the defendant company would be responsible for the willful misconduct, if any there was, of its own employees placed in charge of said sleeping car when such misconduct was of such a nature as to interfere with the safe and comfortable use of said car by the plaintiff for car purposes."

7th. That the court erred in giving to the jury the following portion of its charge:

"If, in fact, the porter on said car did act toward the plaintiff in the manner charged by the plaintiff such conduct on his part would unquestionably be a violation of the duty due and owing from the defendant to the plaintiff whilst she was an occupant of said sleeping car. The pivotal point in the case, gentlemen, is this question of fact which you are called upon to decide."

110 8th. That the court erred in giving to the jury the following portion of its charge:

"In considering impeaching testimony of this character the jury should be careful to distinguish between such discrepancies and statements made at different times by a witness touching a given fact or transaction as may naturally arise from the usual imperfections of the human memory and those which indicate an intention on the part of the witness to prevaricate or mislead. It is only those of the latter character that have weight as matter of impeachment."

9th. That the court erred in giving to the jury the following portion of its charge:

"If by a fair and reasonable preponderance of the evidence you are satisfied that the portion in charge of said car was guilty of the alleged acts of misconduct towards the plaintiff then your verdict should be for the plaintiff."

10th. That the court erred in giving to the jury the following portion of its charge:

"If upon due consideration of the case you find that the porter employed upon the sleeping car was, in fact, guilty of the misconduct alleged againt him by the plaintiff then your verdict should be for the plaintiff."

11th. That the court erred in giving to the jury the following portion of its chare:

"If you find that it was caused by the wrong done the plaintiff upon the sleeping car then the plaintiff is entitled to be compensated for the suffering caused her thereby, and for any injurious effects, temporary or permanent, caused thereby to the person, health, and strength of plaintiff.

111 Briefly restated, the plaintiff, if entitled to recover against the defendant, is entitled to be fairly compensated for all in-

juries, temporary or permanent, directly caused to the plaintiff in her person, health, and strength, by the wrong done her, including compensation for the pain and suffering, mental and physical, which has been caused or may hereafter be caused to the plaintiff by reason of the wrong suffered by the plaintiff."

12th. That the court erred in refusing to give instruction 1st, asked by defendant, as follows:

1st. You are instructed that the present action is one brought upon an express contract, and that every material allegation relating to said contract must be proven by the plaintiff before she can recover. Unless, therefore, she has proven to your satisfaction that under said contract she was entitled to the care, attention, and protection of the defendant company and its employees the plaintiff cannot recover.

Refused. To which refusal the defendant then and there excepted.

13th. That the court erred in refusing to give instruction 2nd, asked by defendant, as follows:

2nd. The plaintiff having refused to produce the contract between herself and the defendant and having failed to show what the contract was or what obligations it imposed upon the defendant, you are instructed that the obligation to provide for the safety and security of plaintiff or her immunity from insult and injury is not to be inferred from the purchase or possession of defendant's ticket, and defendant therefore is not liable in this action.

Refused. To which refusal the defendant then and there duly excepted.

112 14th. That the court erred in refusing to give instruction 3rd, asked by defendant, as follows:

3rd. You are instructed that this action is based upon an express contract with the plaintiff; that before she can recover anything she must prove by a preponderance of the evidence that the said defendant has broken the said contract, and if you find that the said contract was broken by the said defendant, then plaintiff can recover only the actual damages resulting therefrom, and cannot recover any damages to punish defendant or such as are in law called exemplary damages.

Refused. To which refusal the defendant then and there duly excepted.

15th. That the court erred in refusing to give instruction 4th, as asked by defendant, as follows:

4th. You are instructed that, the plaintiff having failed to establish and prove by the evidence the contract set out in the second paragraph of the petition, she cannot recover in this action.

Refused. To which refusal the defendant then and there duly excepted.

16th. That the court erred in refusing to give instruction 5th, asked by defendant, as follows:

5th. You are instructed that an employer is not liable for a willful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve the

purpose of his employer by the willful act, and if you find that the alleged assault was not made with the purpose to serve the defendant company, then you should find for the defendant.

Refused. To which refusal the defendant then and there duly excepted.

113 17th. That the court erred in refusing to give instruction 6th, asked by defendant, as follows:

6th. You are instructed that the defendant is not responsible in this action for a malicious assault made by the porter of its sleeper while he was not engaged in the performance of his duties as such porter and when such assault was not made for the purpose of serving said defendant by his willful act, and if you shall find in this case that the alleged assault was not made by the porter while engaged in the performance of his duties, then you should find for the defendant.

Refused. To which refusal the defendant then and there duly excepted.

18th. That the court erred in refusing to give instruction 7th, asked by defendant, as follows:

7th. You are instructed that if the act of the porter was not necessary to the performance of the service of the defendant and was not intended for that purpose, but was committed, if committed at all, only to gratify his own lust, then the act was not within the scope of his employment, and the defendant is not liable therefor.

Refused. To which refusal the defendant then and there duly excepted.

19th. That the court erred in refusing to give instruction 8th, asked by defendant, as follows:

8th. You are instructed that if the defendant is liable at all it is liable only for the direct and immediate consequences of whatever breach of contract may have occurred and only for such damages as were fairly within the contemplation of the parties wh-n the contract was made. The defendant is not liable for any damages rerulting from the peculiar condition of the plaintiff, such condition not having been made known to the defendant and the con-

114 tract not having been made with reference thereto. If you shall find that the plaintiff was in a pregnant condition, that such condition was not made known to the defendant, and did not enter into the contemplation of the parties to the contract, then defendant is not responsible for any damages resulting specially from such pregnancy.

Refused. To which refusal the defendant then and there duly excepted.

20th. That the court erred in refusing to give instruction 9th, asked by defendant, as follows:

9th. You are instructed that if plaintiff passed through her miscarriage and was recovering therefrom, and that by her imprudence and negligence she brought upon herself the inflam-ation from which resulted the lasting injuries of which she now complains, then the defendant should not be held responsible for the lasting injuries.

Refused. To which the defendant then and there duly excepted.

21st. That the court erred in refusing to give instruction 10th, asked by defendant, as follows:

10th. You are instructed that defendant is responsible, if responsible at all, for such injuries only as are the direct consequences of the wrong complained of and is not responsible for such injuries as may afterwards have resulted from her own imprudence and negligence.

Refused. To which refusal the defendant then and there duly excepted.

22nd. That the court erred in refusing to give instruction 11th, asked by defendant, as follows:

11th. You are instructed that under the contract between Pullman Palace Car Co., the defendant, and the C., M. & St. P. R. R. Co. the porter of the sleeping car attached to the train of said railroad company upon which plaintiff was riding upon the 16th
115 of February, 1889, was the servant of said railway company in all respects, save as to such matters as pertained to the arrangements peculiar to a sleeping car, and was under its direction and control in all matters, including the protection of passengers from insult and injury, and you should therefore find for the defendant.

Refused. To which refusal the defendant then and there duly excepted.

23rd. That the court erred in refusing to give instruction 12th, asked by defendant, as follows:

12th. You are instructed that if you find from the evidence that the porter, who is charged with having committed the assault upon the plaintiff, was not at that time under the direction and control of the defendant, but was, in fact, acting under the direction and control of the Chicago, Milwaukee & St. Paul R. R. Co. in all matters relating to the protection of passengers from insult and injury, then he was not the servant of the defendant relating to such matters, and defendant is not responsible for the assault, if any, made by him.

Refused. To which refusal the defendant then and there duly excepted.

24th. That the court erred in refusing to give instruction 13th, asked by defendant as follows:

13th. If the porter charged with the assault was under the direction of the C., M. & St. P. R'y Co., and the proper employees of the latter road had the right to direct and control him in all matters, save those relating to the care of what pertained exclusively to a sleeping car, then the railway company is responsible for any assault he may have made upon the plaintiff, and defendant is not liable in this action.

Refused. To which refusal the defendant then and there duly excepted.

116 25th. That the court erred in refusing to give instruction 14th, asked by defendant, as follows:

14th. You are instructed that if the porter who is charged with

making the assault was furnished by the defendant to the Chicago, Milwaukee & St. Paul R'y Co. under the contract offered in evidence and was thereunder subject to the control and direction of said railroad company and not of defendant, then you should find for the defendant.

Refused. To which refusal the defendant then and there duly excepted.

26th. That the court erred in refusing to give instruction 15th, asked by defendant, as follows:

15th. The responsibility of the railway company for the safety and security of its passengers is not diminished by the fact that the same passengers may have contracts with the sleeping-car company for the accommodations upon its cars. The duty of the sleeping-car company is to provide the arrangements peculiar to their cars, while the duty of the railroad company is to see that passengers on such cars constituting a part of its trains shall be protected from insult and injury, and for any failure to so protect them it and not the sleeping-car company is liable.

Refused. To which refusal the defendant then and there duly excepted.

117 27th. That the court erred in overruling defendant's motion for a new trial.

28th. That the court erred in rendering judgment against defendant on the verdict of the jury.

29th. That the court erred in overruling defendant's motion in arrest of judgment and to dismiss or remand the action to the State court, it appearing affirmatively from the evidence that the court had no jurisdiction of the cause.

JOHN S. RUNNELLS,
E. H. HUBBARD,
Attorneys for Defendant.

[Endorsed:] Filed Oct. 30th, 1890. A. J. Van Duzee, cl'k. J. H. Bolton, d'p'ty.

118 In the Supreme Court of the United States.

JEANNIE CAMPBELL, Plaintiff and Defendant in Error,
vs.
PULLMAN'S PALACE CAR COMPANY, Def't and Plaintiff in Error.
} Prayer for Reversal.

To the honorable justices of the Supreme Court of the United States:

And now comes Pullman's Palace Car Company and represents that—

Whereas in the records and proceedings and also in the rendition of judgment in a suit between Jeannie Campbell, plaintiff, and said Pullman's Palace Car Company, defendant, tried in the circuit court of the United States in and for the northern district of Iowa,

manifest error hath intervened, as fully appears from the transcript of said records and proceedings filed herewith:

Now, therefore, said defendant, the plaintiff in error, prays that said action and judgment of said circuit court may be reversed and that said errors may be duly corrected and full and speedy justice be done to the parties aforesaid in that behalf.

To which end said defendant hath prosecuted the writ of error in said cause, as set forth in the transcript of said records and proceedings.

JOHN S. RUNNELLS,
——— ———,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed Oct. 30th, 1890. A. J. Van Duzee, cl'k. J. H. Bolton, d'p'ty.

119 UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

I, A. J. Vanduzee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify and return that the writ of error which is hereto attached was served and filed in my office, at Sioux City, on the 10th day of Sept., A. D. 1890, and a copy thereof at the same time lodged in my office, and I now return said writ of error and annexed thereto and hereto attached an authenticated copy of the record of the cause mentioned in said writ of error and the following-named papers filed therein, to wit:

The assignment of errors, the prayer for revi-sal, and the citation and proof of service thereof.

Seal Circuit Court U. S., Northern District of Iowa, Sioux City.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at Sioux City, in the said district, this 14th day of Oct., A. D. 1890.

A. J. VAN DUZEE, *Clerk*,
By J. H. BOLTON, *D'p'ty.*

Costs of trans., $29.90.

Endorsed on cover: Case No. 14,407. N. Iowa C. C. U. S. No. 344. Pullman's Palace Car Company, plaintiff in error, *vs.* Jeannie Campbell. Filed November 3, 1890.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

Pullman's Palace Car Co.,
Plaintiff in Error,
vs.
Jennie Campbell,
Defendant in Error.

Error to Circuit Court of the United States for the Northern District of Iowa.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN S. RUNNELLS,
WILLIAM BURRY,
ATTORNEYS FOR PLAINTIFF IN ERROR.

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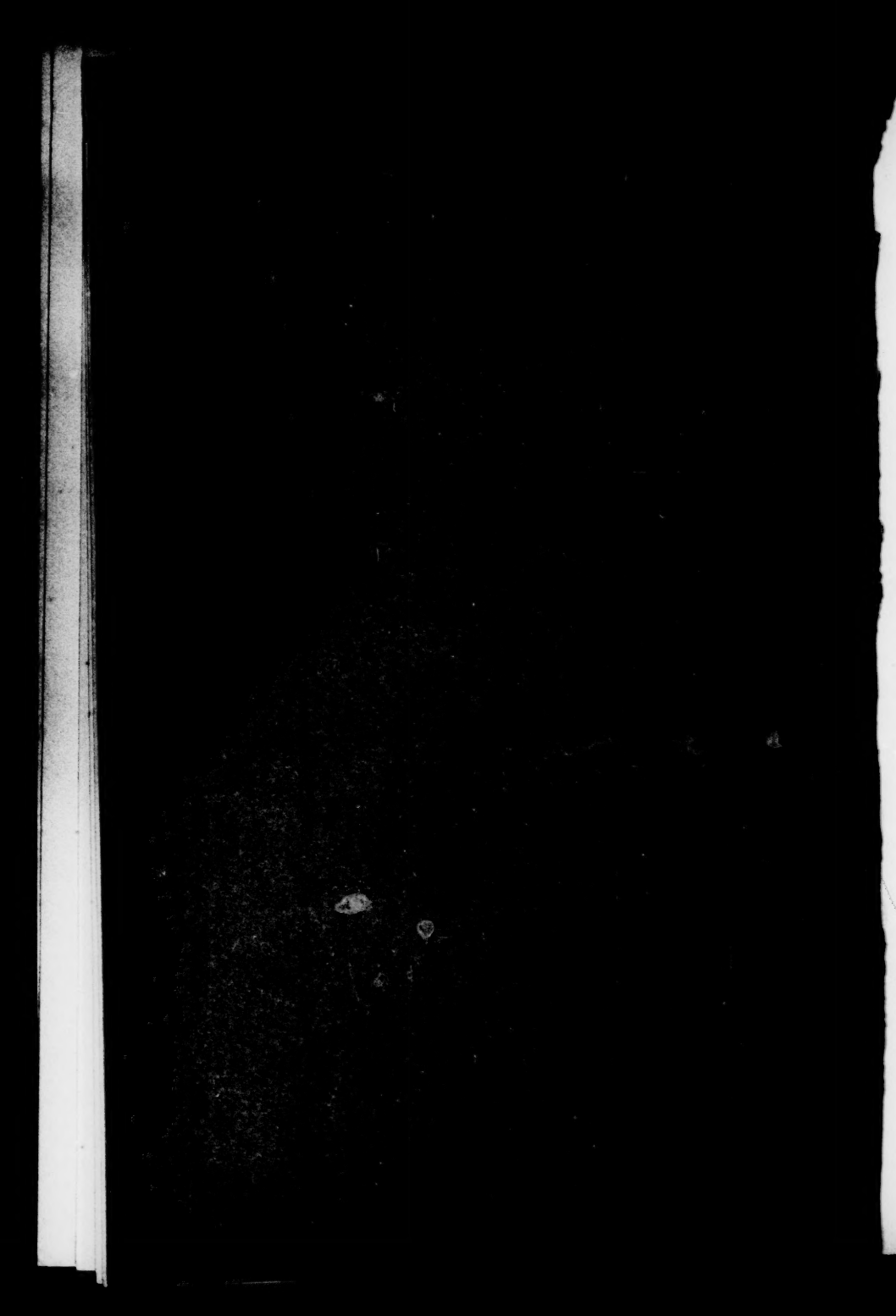

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1893.

Pullman's Palace Car Co.,
Plaintiff in Error,
vs.
Jeannie Campbell,
Defendant in Error.

Error to Circuit Court of the United States, for the Northern District of Iowa.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action brought by defendant in error against plaintiff in error to recover for an assault she claims was committed on her by one of the sleeping car porters of plaintiff in error while she was a passenger in one of its cars. Her petition (rec., 2), avers that on February 16, 1889, while the car was approaching Sioux City, Iowa, and she was the only passenger in the car, the porter came to her sleeping berth, wakened her, made improper proposals, and unbuttoned his clothing; that she escaped from him, took refuge in the toilet room of the car and remained there till the train reached Sioux City; that as a result she was very sick, suffered a miscarriage and has not recovered and will not recover her health again.

The case was tried to a jury and resulted in a verdict for defendant in error of $11,000.

Upon the question of this assault there was a strong and irreconcilable conflict of testimony. The porter denied the charge altogether and considerable testimony was given in support of his denial.

It was important, in the midst of this conflict of evidence, that the presiding judge should preserve a strict impartiality, and that he should not, in the course of the trial, make any remarks that would prejudice the jury concerning the facts they were to pass upon, or indicate in any way that he considered the defense not made in good faith.

It was proved that previous to the alleged assault the porter had always been attentive to business and that he had borne a good character (rec., 34).

Against the objection of counsel, the court instructed the jury that the company was liable for all *willful misconduct* of its employe, the porter (rec., 48, 49), and refused to instruct the jury that the company was not liable for a malicious assault made by the porter while he was not engaged in the performance of his duties as such porter, and when such assault was not made to serve the company but to gratify his own lust, (rec., 52).

The court also refused to allow plaintiff in error to show what the duties of the train conductor and brakemen were.

The assignments of error relied on by plaintiff in error are:

1st. The court below erred in holding and charging the jury that the plaintiff in error was liable for the assault, even though it was made by the porter when not

engaged in the performance of the service for which he was employed, but was caused by his willful misconduct and to gratify his lust.

2d. The court below erred in excluding testimony concerning the duties of the train conductor and brakemen.

3d. The conduct and remarks of the court below were such as tended to prejudice the jury against plaintiff in error, to discredit its witnesses, and to prevent a fair and impartial trial.

As we said above, the result of the case depended upon conflicting testimony. The testimony for the defendant was, we think, much the stronger and should have prevailed. It was, at least, so strong that an error of the court below, in the particulars above referred to, might easily have turned the scale in favor of the plaintiff below.

For the purpose of showing the conflict of evidence and that a slight error of the court below in the conduct of the trial or in instructing the jury would work serious injury, we call the attention of the court to the evidence in the following particulars.

The case of the plaintiff below rested entirely on her own evidence. On the trial she testified (rec., 27) about the porter coming to her berth, the state of his clothing, his proposals, and that "she gathered up her "clothes and went to the ladies' toilet, *the porter making* "*no resistance*, that she locked herself up in the toilet-room "and remained there about three-quarters of an hour, un-"til the train was nearly to Sioux City." She also testified (rec., 28) that she came out of the toilet-room half an hour before arriving at Sioux City; that before arriv-

ing there a waiter from the dining room (car) came into the sleeping-car and asked her if she would have a cup of coffee, which she declined, but that she made no complaint to him.

She admitted (rec., 29) that some time before she had given a deposition in the case in which she testified that she had remained in the toilet room "until the train "got into Sioux City," and that when she attempted to leave it, the porter barred her way. This latter statement of hers is shown again on the record, page 36.

In her sworn complaint (rec., 3) she says that she was compelled to use her utmost force and strength to escape from the porter and reach the toilet-room.

The porter's testimony (rec., 32) directly contradicted her story in every particular and shows her to be a nervous, excitable person, unused to travel and that she was apparently afflicted with nightmare; but that he behaved in a thoroughly respectful manner towards her. It was also shown (rec., 33, 34) that the brakeman and train conductor frequently passed through the train that morning, and saw nothing wrong and that no complaint was made by her to them.

The testimony of the porter was thus in large part corroborated, while plaintiff contradicted herself repeatedly, and it is hard to believe her story (rec., 27) that the porter, after going so far, as she says he did, did not attempt to use force.

In charging the jury the court said substantially that it was only a question of whom the jury would believe, and, with the evidence as above stated, it is clear that a slight error in the rejection of testimony or in instructing the jury or in the manner in which the trial was conducted, might determine the character of the verdict.

The attention of the court is respectfully first called to the first assignment of error, that the court erred in instructing the jury that plaintiff in error was responsible for willful misconduct of the porter (rec., 48, 49), and in refusing to instruct the jury, as asked, (rec., 52) that it was not responsible for his willful and licentious misconduct, not in any way connected with or relating to his employment.

In considering this question we call attention to the contract between the railroad company and plaintiff in error (rec., 37--46), under which the sleeping-car in question was operated. It will be seen from it that the railroad company had complete control of the car and of its movements, and received all the transportation money from passengers traveling in it. By section 8 of the contract it appears that the sleeping-car employes were subject to all the rules of the railroad company, and therefore under control of the train conductor. Only as the porter attended to the peculiar arrangements of the sleeping-car was he the representative of the plaintiff in error. In *Pullman's P. C. Co.* v. *Smith*, 73 Ill., 360, it was held that the Pullman Company was neither a common carrier nor an innkeeper, and in *Penna Co.* v. *Roy*, 102 U. S., 451, it was held that a sleeping car was part of the railroad company's train, was under its charge, and that the sleeping-car employes were employes of the railroad company.

It is only, therefore, when the porter is acting within the scope of his duty to and employment by the plaintiff in error that his acts are its acts, in such sense that it is liable for them.

The distinction as to sleeping-car employes, and the limits of the liability of the sleeping-car company for the

unauthorized acts of its servants, are well stated in a case that arose in Louisiana. A passenger in a railroad coach wished to wash his hands, and asked the brakeman where he could do so. The brakeman directed him to the sleeping-car. The porter of that car objected to his using the lavatory on the ground that it was reserved for passengers in the sleeping-car. A quarrel ensued and the passenger was injured. He sued the railroad company and the sleeping-car company jointly. A separate trial was asked for by and allowed to the sleeping-car company. The Supreme court held that the railroad company was liable but that the sleeping-car company was not. In the railroad company case (40 La. Ann., 417), it was held, as in the *Roy* case, which is cited and followed, that the sleeping-car employes were railroad employes, the court saying that the sleeping-car employes "were, in law, the servants and employes of "the railroad company. Their negligence, or the negli- "gence of either of them, as to any matters involving *the* "*safety or security* of passengers while being conveyed, "was the negligence of the railroad company." In support of this proposition the opinion cites other authorities.

This opinion shows the limits of the employment of the porter as a servant of the plaintiff in error. In the case against the sleeping car company the court clearly lays down and defines for what class of acts of the porter the sleeping car company can be held liable. The case is *Williams* v. *Pullman's P. C. Co.*, 40 La. Ann., 87. In discussing the liability the court said:

"'Masters and employers are answerable for the damages occasioned by their servants and overseers in the exercise of the functions in which they are employed.' As is well said by Judge COOLEY, 'it will readily occur to every mind that the master cannot, in reason, be held

responsible generally for any wrongful conduct a servant may be guilty of. A liability so extensive would make him *guarantor of the servant's good conduct*, and would place him under a responsibility which prudent men would hesitate to assume.' The earlier doctrine of the common law affirmed the rule that 'in general, the master is liable for the fault or negligence of the servant, but not for his willful wrong or trespass.' 2 Hil. Torts, 524, *McManus* v. *Crickett*, 1 East., 106; *Sharrod* v. *Railway*, 4 Exch., 508; *Roe* v. *Birkenhead*, 7 Exch., 36; *Wright* v. *Wilcox*, 19 Wend., 345.

"'The test of the master's responsibility,' says COOLEY, 'is not the motive of the servant, but whether that which he did was something which his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name.' Cooley, Torts, 536. The great difficulty in applying these principles lies in defining what acts properly fall within the scope of the servant's employment. The evidence in this case establishes that the porters employed in defendant's service are mere menials, employed to clean up the car, and keep it in order, and to wait upon the passengers; having no police authority whatever, and no connection with the enforcement of the rules of the service, except to report violations of them to the conductor. Anything more completely outside of 'the functions in which he is employed' than the assault committed on the plaintiff could hardly be conceived.

"In another case it was said, 'the rule seems to be, that when the agent, acting in the capacity bestowed upon him by the corporation, and in the discharge of some duty or employment directed by the employer or incidental to his situation, does an act that causes damage, the corporation is responsible; but where the agent does any act of his own free will, without reference to his functions as a corporate agent, the corporation is not responsible. For example, if a person should go into a banking-house or an insurance office, and there get into difficulty or dispute, in relation to business of the corporation, with an agent or officer, and an assault and battery should ensue, we suppose it would not be seriously contended that the bank was answerable in damages, unless

there was some express recognition of the act. *Etting* v. *Bank*, 7 Rob. (La.) 459; *Dyer* v. *Reley*, 28 La. Ann., 6; Pierce, R. R., 279; Field, Corp., sects. 524, 623; *Isaacs* v. *Railroad Co.*, 47 N. Y., 122; *Railroad Co.* v. *Baum*, 25 Ind., 72; *Railroad Co.* v. *Harrison*, 48 Miss., 112; *Flower* v. *Railroad Co.*, 69 Pa. St., 210. Under these views, while we share plaintiff's indignation at the outrage committed on him, we cannot fix the duty of reparation on the innocent defendant, upon whom it is not imposed by the letter or spirit of the law."

In considering this part of the case, it is to be remembered that the character of the porter had always been good (rec., 34).

In Cooley on Torts, p. 535, it is said:

"But the liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do."

On page 537 the same author quotes with approval the following language from *Howe* v. *Newmarch*, 12 Allen, 49.

"If the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable."

In *Poulton* v. *London & S. W. Ry. Co.*, L. R. 2, Q. B. 534, is discussed a wrongful detention by a station-master. The court said:

"It was an act out of the scope of his authority, and for which the company would be no more responsible than *if he had committed an assault* or done any other act which the company never authorized him to do."

Little Miami R. R. Co. v. *Wetmore*, 19 Ohio St., 110, is a case very much in point, and the first paragraph of the syllabus is as follows:

"A master is not responsible for the wrongful act of his servant, unless that act be done in execution of the authority, express or implied, given by the master. Beyond the scope of his employment, the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master."

In *Stephenson* v. *Southern Pacific R. R. Co.*, 93 Cal., 558, the court said:

"The rule is, of course, well settled that the master is civilly liable for the wrongful or negligent act of the servant, committed while in his service, and within the scope of his employment—that is, in the transaction of the master's business; and the converse of the rule is equally well settled, that when a servant acts without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but *to effect some independent purpose of his own*, the master is not responsible in that case for either the act or omission of the servant. *Mott* v. *Ice Co.*, 73 N. Y., 543; *Rounds* v. *Railroad Co.*, 64 N. Y., 129; *Averigg* v. *RailroadCo.*, 30 N. J. Law, 460; *Snyder* v. *Railroad Co.*, 60 Mo., 413; *Cosgrove* v. *Ogden*, 49 N. Y., 257; *Howe* v. *Newmarch*, 12 Allen, 49; *Railroad* v. *Wetmore*, 19 Ohio St., 10. 'The test of the master's responsibility for the act of the servant,' said GROVER J., in delivering the opinion of the court in *Cosgrove* v. *Ogden*, *supra*, 'is not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do.' In *Howe* v. *Newmarch*, *supra*, as the final conclusion of an elaborate opinion, in which many cases bearing upon the subject are considered, the test of the master's responsility for the act of his servant is thus stated: 'And in an action of tort, in the

nature of an action on the case, the master is not responsible if the wrong done by his servant, is done without his authority, and not for the purpose of executing his orders, or doing his work; so that if the servant *wholly for a purpose of his own, disregarding the object for which he was employed*, and not intending by his act to execute it, *does an injury to another*, not within the scope of his employment, the master is not liable.' "

In Addison on Torts, 36, it is said:

"A master is responsible for the wrongful act of his servant, even if it be wilful, or reckless, or malicious, provided the act is done by the servant within the scope of his employment, and in furtherance of his master's business, or for the master's benefit; but if the servant, at the time he does the wrong, is not acting in the execution of his master's business, and within the scope of his employment as his servant, *but is carrying into effect some exclusive object of his own*, the master will not be answerable for his act."

"We fail to find any case which holds that the principal can be held liable for an act done in a matter outside of and foreign to the agent's employment, even though the agent may at the same time have been in the performance of other acts within the scope of his proper authority."

C. B. & Q. R. R. Co. v. *Casey*, 9 Ill. App., 643.

"If the conduct of this driver were malicious and wilful, with intent to injure the plaintiff, he might be liable to indictment for assault with intent to kill, or some other criminal offense; but his employer *was not responsible for his crimes*, nor liable for his acts of wilful or malicious trespass. The company was answerable only for his negligence, or his incapacity or unskilfulness in the performance of the duties assigned him."

McKeon v. *Citizens R. R. Co.*, 42 Mo., 79.

"When a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests, he

no longer acts in pursuance of the authority given him; and according to the doctrine of Lord HOLT, his master will not be liable for such an act."

McManus v. *Crickett*, 1 East., 106.

"Trespass, *vi et armis*, will not lie against a railroad corporation for an injury done to the plaintiff by their locomotive steam engine, whether such injury be wilful or accidental on the part of the servants of the company, where it does not appear that the particular injury was done by the command or with the assent of the defendants."

Phil., Germantown & Norristown R. R. Co. v. *Wilt.*, 4 Whart., 142.

"When an injury is committed by an emplove of a corporation, wilfully and of his own malice, and not in the course of the employment, the corporation is not bound by his acts."

Miller v. *Burl. & Mo. R. R.*, 8 Neb., 219.

Other cases fully upholding the same doctrine, are:

Ills. Cent. R. R. Co. v. *Downey*, 18 Ill., 25; *Chicago, &c., R. Co.* v. *Bayfield*, 37 Mich., 205; *Wood* v. *Detroit City Ry. Co.*, 52 Mich., 402; *Johnson*, v. *Barber*, 5 Gilm., 425; *Mali* v. *Lord*, 39 N. Y., 381; *Fraser* v. *Freeman*, 43 N. Y., 566; *International R. Co.* v. *Anderson*, 82 Tex., 516; *Crocker New London R. Co.*, 24 Conn., 248; *Smith* v. *Memphis Packet Co.* (Tenn.), 1 S. W. Rep., 104; *Frink* v. *Potter*, 17 Ill., 404; Story on Agency, § 456; *Flower* v. *Pa. R. R.*, 69 Pa. St., 210; *Bolingbroke* v. *Swinden*, L. R. 9 C. P. 575; *Oxford* v. *Peters*, 28 Ill., 434.

In the light of these decisions, it would seem that the instruction asked for by plaintiff in error, and refused, ought to have been given.

The second point urged as error is the ruling of the court below, in refusing to allow witness to tell what the duties of the train conductor and brakeman were in regard to the sleeping car. Considering what the evidence was, plaintiff in error was entitled to show anything that would properly corroborate the statement of the porter that he made no improper advances to the defendant in error, and that defendant in error was undisturbed. For that purpose, plaintiff in error sought to show that the train conductor's and brakeman's duties called them frequently through the sleeping-car, and that they saw nothing wrong and heard no complaint. The question as to their duties would probably also have emphasized the fact that they, and not the porter, were in charge of the train and intrusted with the safety of the passenger and the duty of policing the train.

On page 33 of the record is the following:

"Defendant asks the following question of the witness, Lyman Beardsley, superintendent of the Sioux City and Dakota divisions of the Chicago, Milwaukee and St. Paul railway:

Q. What are the duties of the brakeman, who is at the rear end of the train?

(Plaintiff objects as immaterial. Objection sustained, to which defendant then and there excepted.)"

On page 34 is the following:

"Defendant asked of the witness, G. W. Martin, conductor of the train upon which plaintiff was traveling on February 16, 1889:

Q. What were your duties with reference to passing through the train?

(Plaintiff objects. Objection sustained, to which defendant then and there excepted.)"

The action of the court in making the above rulings is now urged as error.

The third assignment of error which is insisted upon is that the trial judge made remarks and rulings during the trial that were not warranted and that strongly tended to prejudice the jury against the defense.

On page 34 of the record appears a hypothetical question propounded by the defense to medical experts. It was plainly competent. The remarks and ruling of the court concerning it (rec., 35), made before the jury, while ostensibly admitting the question, really ruled it out and destroyed all the effect of the expert testimony for the defense. On page 36 the court said:

"In order to save any question about it, I think I will overrule the objection and admit it, and perhaps take an opportunity of expressing my views on such evidence, and what I think of such evidence to the jury. My own judgment is that the jury should not give it any consideration at all, and I think I shall so express it to them under the circumstances."

By the court's charge, which is inserted in the record in full for this purpose, it appears that the court did not refer to the matter again, thus practically ruling the question out, and by the anxiety shown and declared by the judge to avoid any error, the impression was of course given the jury that the judge was in favor of the plaintiff and thought she ought to recover.

The defense sought to prove the general good charac-

ter of the porter, to show that the plaintiff in error was not negligent or careless in hiring him. The court at first declared such testimony incompetent, and said (rec., 56):

"It don't seem to me to be material; but I do not want a ruling that might be error, and thereby have an error that might work a reversal. It strikes me that it is immaterial. The allegation is, did he, in this particular instance, do wrong?"

The spirit in which the trial was conducted is shown by the foregoing remarks of the judge. He declared substantially that, in his opinion, the judgment should be for the plaintiff, for he did not want to make a ruling against the defense "that might work a reversal." That is, he declared in the presence of the jury that he desired to sustain the verdict that he intimated should be rendered. He thereby took sides in the controversy. It would have worked far less injury to the defense, if he had ruled the testimony out, than it did to say in the presence of the jury that it was immaterial and incompetent, and the jury should pay no attention to it, but that to avoid error and save the judgment he would formally admit it. Was not this in effect telling the jury that they must disbelieve the defense, believe the plaintiff, and render a verdict in her favor?

By his remarks and rulings the trial judge practically directed the jury to disregard all the expert testimony offered by the defense as to the extent or permanency of plaintiff's injuries, and suggested that the character of the porter who was the main witness for the defense and upon whose testimony the defense largely rested, was of no consequence.

Many things occur on a trial that cannot be preserved in a bill of exceptions. The remarks and manner of a

judge can influence the result in almost every case. This court can readily conceive, from the above remarks of the presiding judge, the consideration accorded the defense. The pronounced leaning in favor of the plaintiff shown by the above extracts from the record, must, we respectfully submit, have so influenced the jury that the defense did not have a fair trial.

In *McMinn* v. *Whelan*, 27 Cal., 300, the trial judge, in disposing of an objection to the testimony of a witness on the stand, spoke of the witness' high standing in the community.

On this point the Supreme court said:

"From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power, by words or actions, or both, to materially prejudice the rights and interest of one or the other of the parties. By words or conduct he may, on the one hand, support the character or testimony of a witness, or, on the other hand, may destroy the same in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other. We regret the necessity for an expression of our disapproval of the irregularity of which complaint is made, and though we do not impugn the expression as designed to aid the side of the plaintiff, we may say we should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing was thus endorsed."

In Thompson on Trials, § 218, it is said:

"Undoubtedly, any remarks of the presiding judge made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford grounds for a reversal of the judgment."

In *McDuff* v. *Journal Co.*, 84 Mich., 9, a colored man, named Johnson, was a witness for defendant. Because

his testimony contradicted plaintiff's testimony, plaintiff's counsel stated that the witness had deliberately lied and asked the court to commit him for perjury. The judge thereupon said:

"I tell you, I have a decided opinion of this man's testimony, and I intend in my charge to the jury to call their attention to his testimony. The manner in which this man swore yesterday is something I shall never live long enough to forget. And put this in the record, if it ever gets out of the court room, and keep it there: A man who will do as he did, and point out a man under the solemnity of oath, and swear that a certain man paid $1.10, I say, sir, I have my opinion about it, and a decided opinion of it."

After commenting on the conduct and language of the judge at some length, the Supreme court said:

"To sanction such conduct and language as the above by the Circuit judge, would tend to render trials a farce, and result in a denial of justice. Language less open to criticism has been held error by this court."

Other cases announcing the same principle and held to be error are: *State* v. *Tickel*, 13 Nevada, 502; *McIntosh* v. *McIntosh*, 79 Mich., 195; *Darrow* v. *Pierce* (Mich.), 51 N. W. Rep., 813; *Graham* v. *McReynolds*, 18 S. W. Rep., 272; *Brunker* v. *Cummins* (Ind.), 32 N. W. Rep., 732.

When we consider the questions submitted to the jury, the relative weight of the evidence, and the need, amid such contradictory testimony, of accurate instructions to the jury and of strict impartiality in the judge, we think the verdict a great wrong to the plaintiff, and respectfully ask a reversal of the judgment.

JOHN S. RUNNELLS,
WILLIAM BURRY,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

Pullman's Palace Car Co.,
Plaintiff in Error,

vs.

Jeannie Campbell,
Defendant in Error.

Error to Circuit Court of the United States for the Northern District of Iowa.

BRIEF FOR DEFENDANT IN ERROR.

We will assume that all assignments of error not argued have been abandoned, and therefore, with the exception of the question of jurisdiction, we will confine ourselves to the points presented.

We mention the jurisdictional question under the impression that the court usually examines the question, and especially when the jurisdiction has been questioned by the errors assigned.

This question of jurisdiction of the circuit court was raised for the first time after the evidence had all been introduced, and the case fully submitted, and the verdict of the jury had been rendered; and it was then raised without notice

or plea, but simply on a motion to arrest the judgment and dismiss or remand the case. Originally the case was brought in the State court, and was removed to the circuit court of the United States by the plaintiff in error; and in the petition for removal the necessary averments were made to confer jurisdiction on the circuit court. Tr. p. 4. It is therein alleged "that the plaintiff, Jeannie Campbell, was at the time of the commencement of this suit, and still is a citizen of the State of Iowa, and the defendant is a corporation duly organized as such under and by virtue of the laws of the State of Illinois, and is a citizen of said State," and this petition for removal was verified by the attorney for the corporation. On this affidavit the district court of Iowa found that the case should be removed, and a removal of the same was thereupon ordered, and the circuit court assumed jurisdiction of the same.

Before any evidence could properly be introduced negativing the allegations of the petition for removal, it would have been necessary for the plaintiff in error to file some plea controverting the allegations of the petition, under the rule laid down by this court in the case of *Hartog vs. Memory*, 116 U. S. 590, and followed in the case of *Morris vs. Gilmer*, 9th S. C. R., 290-293. In the case of *Hartog vs. Memory* it is said: "Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction, or some other appropriate form of proceeding. The case is not to be tried by the parties as if it was a plea to the jurisdiction, when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no juris-

diction, that the court can dismiss the case upon the motion of either party."

And while this opinion was criticised somewhat in the later case of *Morris vs. Gilmer*, the rule quoted was adhered to, for referring to the former case, it is said: "The court summarily dismissed the action upon the ground solely of want of jurisdiction, without affording the plaintiff any opportunity whatever to rebut or control the evidence upon the question of jurisdiction. The failure, under the peculiar circumstances disclosed in that case, to give such opportunity, was itself sufficient to justify a reversal of the order dismissing the action," and as to whether or not it would have been proper to have allowed the plaintiff in error to introduce such a plea, was a matter peculiarly within the discretion of the circuit court; and if such a plea had been tendered, and it had been denied by the court, it would not have been ground for reversal.

Railway Co. vs. Pinkney, 13 S. C. R., 1860-62.

If the plaintiff in error had complied with the practice and tendered a plea denying the citizenship of the plaintiff, it could not have been permitted because of the contrary allegations made by it in its petition for removal. The company could not have been permitted to file a plea controverting its own allegations. Such conduct would amount to an imposition on the court, which ought not to be tolerated without a very strong showing that the first affidavit was made under an excusable misapprehension of the facts.

Therefore, for want of a proper plea at the proper time, the evidence as to citizenship of the plaintiff cannot be considered, but, if it should be considered, it would not sustain

the contention of the plaintiff in error for it does not affirmatively appear that the defendant in error was not a citizen of Iowa when the action was commenced, and under the proper allegations of citizenship which had been made and then appeared in the record the burden of proof, to say the least, is upon the plaintiff in error to show a want of the requisite citizenship. And in considering this question, it will be remembered that the jurisdiction of the circuit court was not sought by the defendant in error. There is no evidence whatever, that she removed to Iowa for the purpose of bringing this suit, or that she in any way was attempting to gain the jurisdiction of this court by improper means. The only point that can be made properly and truthfully by the plaintiff in error is, that the evidence fails to show the length of time which Mrs. Campbell expected to reside in Iowa, when she made this State her home, and fails to show that she intended to remain in the State permanently. But it is not necessary that this fact should appear in the testimony as it was not in issue and did properly appear in the record. On the contrary, if the proper plea had been made, it would have been necessary for the plaintiff in error to have proved the contrary—not by doubtful and circumstantial evidence—but by clear, positive and convincing proof. Especially in view of the affidavit it had caused to be made.

The most that can be claimed from the evidence is, that Mrs. Campbell's husband made his headquarters at Sioux City, to travel for the Kerr Thread Company, and that he came out to Iowa to take the place of a man who had gone south for six months, but there is no evidence in the case that he expected to return to Chicago at the end of the six months, or intended to limit his residence in Iowa to that period. The evidence does show that his residence was in good faith and

wholly without reference to the commencement of this suit, and for the purpose of carrying on his ordinary and usual business, and perhaps it might be true that with such persons, who work on a salary in the employment of companies or corporations, that their residence is always more or less uncertain, being always subject to the orders and wishes of their employers; and so with the plaintiff's husband—his residence in Iowa might be longer or shorter as the wishes of the Kerr Thread Company might require. He might have been recalled within the six months, or he might have stayed for many years. He did not attempt to testify as to how long he expected to stay or proposed to remain in Iowa, for he did not know—and probably his firm did not know—as this question would depend upon the exigencies of their business and not upon his own will or volition. But while he did stay it was his home, and the only home he had; and he had made all arrangement to make it his home, and had sent for his wife to come out. It is true that people following this class of occupations change their homes oftener than people in some other lines of business, but every person has a home, and the homes of these people are where they happen to be employed: and if it is bona fide, the length of time that they stay is immaterial, and therefore there is nothing in the evidence to defeat the citizenship of the plaintiff.

The plaintiff in error, in arguing its first assignment of error, urges the proposition that the master is not liable for the wilful torts of his servant unless done in the course of his employment, and we believe that we might safely admit the correctness of all the law cited by it without impairment of the propositions upon which this case is based, and upon which it was submitted to the jury.

The basis of the action is the neglect of duty and the wilful wrong done by the servant and the consequent liability

of the master, based upon the doctrine of *respondeat superior*, which is applicable not only because of the contract made by the sale of the ticket and the responsibility thereby assumed, but also because of the public duty which a necessary and just public policy must prescribe and enforce.

It may be true that no direct and specific application of of the doctrine has been made by this court to companies of this character, yet there is no good reason advanced, and none seems to suggest itself to the mind, why they should be exempted from its operation.

Strictly speaking they are, perhaps, neither carriers nor innkeepers, and yet, in some respects, their responsibilities are greater than either.

The accommodations they offer to the public make it necessary for the traveler to repose the utmost confidence in the company and its servants, for there is no way provided for the traveler to protect herself.

Such companies hold themselves out to the public as affording such protection and invite the fullest confidence. They accept compensation for such protection and thereby contract that it will be afforded.

The schedules of railway carriers and the exigencies of modern travel make it necessary for the traveling public to accept these accommodations, and therefore, in addition to its private contract, a public duty devolves upon such companies, which, in its limitations, is measured by the responsibility assumed.

It follows, as a necessary sequence, that any violation of this contract or this duty creates a liability for any injury thereby incurred.

It is also manifest that such companies, as all other corporations, can only act through agents or servants. The company can commit no act except through its servants. In this case the sole representative of the company in charge of the car was the porter who committed the assault; therefore, at that time, in all matters connected with the care and protection of the passenger, he was acting for the company, and as such service required constant vigilance and attention, he was at all times engaged in that service.

The company's duty was his duty, and any breach of that duty by him was the act of the company.

The fallacy of counsel's argument in urging that the assault of the porter was not within the scope of his employment is apparent when we remember that the assault was the grossest violation of the very duty he was employed to perform.

The mere passive act of permitting such an assault by any other person, would be such a neglect of duty as would carry a liability, for it would be the neglect of a duty he was directed to perform for the Company. How much clearer the liability when he not only permitted but committed the assault. How fallacious the defense that predicates an exemption from liability on the fact that the crime was committed by its own servant and not by another.

While these principles have not been directly applied by this court to the case of a sleeping car company, they have been frequently applied to other cases of a like character and under similar circumstances. In the case of the *Philadelphia & Reading Railroad Company vs. Derby*, 14 How., 291, it is said: "The rule of *respondeat superior*, or that the master shall be civilly liable for the tortious acts of his servant, is of

universal application, whether the act be of omission or commission; whether negligent, fraudulent or deceitful. If it be done in the course of his employment, the master is liable, and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable if the act be done in the course of his servant's employment. See

Story on Agency, § 452.

Smith on Master and Servant, 152.

There may be found, in some of the numerous cases reported on this subject, dicta, which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depended on the question whether the servant, at the time he did the act complained of, was acting in the course of his employment; or, in other words, whether he was or was not, at the time, in the relation of servant to the defendant."

The rule established by several of the supreme courts of the States is: "That where the misconduct of the agent causes a breach of the obligation or contract of the principal, then the principal will be liable in an action, whether such misconduct be wilful or malicious, or merely negligent."

M. & M. R. R. Co. vs. Finney, 10 Wis., 330-337.

Weed vs. Panama R. R. Co., 17 N. Y., 362.

Bryant vs. Rich, 106 Mass., 180.

McKinley vs. C. & N. W. Ry., 44 Ia., 314.

Craker vs. C. & N. W. Ry., 36 Wis., 657.

We desire to call particular attention to the latter case, which is of great value, not only from the similarity to the case at bar, but for the strength and ability of Justice Ryan's opinion. On page 674 he says: "We are unwilling to waste time and patience in discussing the conductor's violation of the appellant's contract with the respondent. Every woman has a right to assume that a passenger car is not a brothel, and that when she travels in it she will meet nothing, see nothing, hear nothing to wound her delicacy or insult her womanhood. It is enough to say that the appellant's contract of careful carriage with the respondent was not kept; was tortiously violated by the officer appointed by the appellant to keep it." See also:

Terre Haute R. R. Co. vs. Jackson, 6 Am. and Eng. R. R. Cases, 178.

Chicago, etc., R. R. Co. vs. Flexman, 8 Am. and Eng. R. R. Cases, 354.

Stewart vs. Brooklyn R. R. Co., 12 Am. and Eng. R. R. Cases, 127-*129*.

Goddard vs. Grand Trunk R. R. Co., 57 Maine, 202.

Many cases have arisen in the State courts involving the duties and liabilities of sleeping car companies, but so far as we have been able to ascertain, it has been uniformly held that there is an obligation on the part of the company to exercise reasonable care and vigilance over the persons and property of passengers, especially while they are sleeping.

Am. and Eng. Enc. of L., Vol. 22, p. 797, in cases cited.

The case of *Williams vs. Pullman Palace Car Co.*, 40 La. Ann., 87, cited by plaintiff in error, is not in point. In that

case the party seeking to recover from the Pullman Company was not a passenger upon the Pullman car, but was a trespasser, and the company had assumed no obligation toward him, and the question was which company was responsible; and in holding that the railroad company was responsible, the Louisiana court approved the doctrine we are contending for.

The instructions of the trial court complained of are in strict accordance with these rules of law. It was admitted on the trial that the defendant in error was a passenger on the sleeping car and had paid for and received a ticket entitling her to a berth from Chicago to Sioux City, and that she also held a railway ticket entitling her to ride on the train. It was also admitted that the porter complained of was the sole representative of the company in charge of the car, therefore, there was no question of fact to submit to the jury as to whether, at the time of the assault, the porter was in the employ of the company, for he was necessarily in their employ at all times; and the only remaining questions of fact to be submitted were: whether the assault was committed, and if so, what was the degree of the injury and what was the damage sustained. If the doctrine contended for by the plaintiff in error should be sustained by this court and it should be held that the company is not responsible for the wrongs and crimes of the servants it places in charge of its cars, there is no one who would suffer so great a pecuniary loss as the plaintiff in error, for the traveling public would necessarily lose all confidence in the management of the company, and would hesitate to trust the honor and reputation of their wives and daughters and their own lives and property to the care and protection of a corporation which could and would evade responsibility on the plea that the acts of its servants were criminal in their character and not authorized or ratified by the company.

The second point of error urged is the ruling of the court in excluding the evidence of the train conductor and brakeman as to their duties in regard to the sleeping car. In considering this question it will be remembered that there is no claim that the conductor and brakeman had any duty to perform with regard to the sleeping car, except its operation as a part of the train. Nor did the question call for any information as to what they did in fact do in performance of their duties. The only object of the testimony was to throw discredit upon the testimony of the defendant in error by showing that the duties of the trainmen required them to pass through the car, and they had seen nothing of the assault and had heard no complaint made of it. There was no objection made to the testimony of any of the employees as to what they in fact did or saw or heard. If they had passed through the car the morning of the assault such fact might have tended to throw some light on the matter; but the fact as to whether their duties called them through the car occasionally was immaterial, as there was no testimony offered tending to show that they performed their duties in that respect and there was no statement of the counsel that the plaintiff in error proposed to furnish such testimony. The objection was, that it was immaterial what the duties of these trainmen were. The important inquiry was what they did in fact do, and this objection was sustained, and in this ruling we think there was no error. What the duties of these men were could not possibly throw any light upon the truth of the statement of the defendant in error as to the assault, and it is manifest that these witnesses had no recollection of passing through the car or of any other circumstance connected with the matter; because, if they had any such knowledge or recollection, questions would undoubtedly have been asked drawing out such information; and if these men had no recollection as to the matter, it was idle to

ask the jury to speculate upon the question as to whether they did actually perform their duties on that particular morning.

The third and last point argued by the counsel—that the trial judge made remarks that tended to prejudice the jury against the defense—finds no support whatever in the record, which does not disclose any bias or feeling or prejudice on the part of the court against the plaintiff in error. The most that can be justly claimed by counsel is that under his persistent importunities the court permitted him to introduce evidence which was both incompetent and immaterial, and that the court indicated his judgment that the evidence was inadmissible when he admitted it, but gave to the plaintiff in error the benefit of whatever doubt there was in his mind, couched in patient, considerate and impartial language. The construction placed upon the language by counsel for plaintiff in error, is only possible by the use of an unrestricted imagination. An obscure and hidden meaning is claimed to exist in the remarks of the court, which the fair, full and impartial instructions of the court, and the unlimited range allowed to counsel for the plaintiff in error in the introduction of his testimony, should prevent him from assuming. The court said nothing that could possibly be construed into an opinion of the merits of the case, or the rights of the parties, or the ultimate judgment which should be rendered. He simply expressed his opinion that the testimony offered was incompetent, and intimated that he might eventually exclude it.

If the testimony was in fact incompetent, there could certainly be no prejudicial error in the remarks of the court that he believed that such was the case. We believe that a very brief examination of the testimony offered, and which the trial court unwillingly received, would convince this court that it was incompetent and immaterial, and should have been excluded from the consideration of the jury.

The first instance of this character referred to by the counsel was in the ruling on the admissibility of the testimony of a doctor who was called as an expert to testify as to the probable extent and duration of the injuries to the defendant in error. This doctor had never seen the patient, and knew nothing of her condition except as was stated in the question, and we believe that it is a matter of common observation and knowledge that it is absolutely necessary that a doctor should know and see his patient before he can form any opinion of any value in such cases. If the plaintiff in error had not been given a full opportunity for an examination of the defendant in error, by its doctors and experts, then the court, in the exercise of a sound discretion, might have been compelled to permit expert testimony to be introduced, even of such a weak character as the expert testimony of a doctor who had never seen his patient; but in this case there was no such reason for the introduction of such testimony, for the plaintiff in error had full opportunity, and fully availed itself of it, to examine the patient, and after such an examination the evidence of the doctors who made it was introduced in the trial of the case. The defendant in error submitted to this painful and humiliating ordeal for the purpose of giving to the court and jury the very best evidence possible of the character of her injuries; and having thus permitted these various examinations, she was entitled to object to the guessing of doctors who knew nothing about her case.

The only other instance where the remarks of the court are called in question was in the discussion of the admissibility of testimony offered by the plaintiff in error tending to show that the porter was a man who had previously borne a good character, and in considering the competency and materialty of this testimony it should be borne in mind that it was not sought to hold the plaintiff in error liable

on the ground of negligence in employing improper servants, or servants of previously bad character, for the case rested upon an entirely different principle, as has been heretofore suggested. Neither had there been any attempt to impeach the testimony of this porter by showing him to be a man of generally bad moral character, and the moral character of this porter had not been called in question in any way, except as it was necessarily proven to be bad by the assault committed; therefore, the moral character of this porter was an immaterial issue before the jury, and if he had the best character of any man in the land it would not screen the plaintiff in error from liability, if the assault was actually committed. It would make but little difference to any injured party whether the assault committed was the first or the last, and it would not affect the liability of the plaintiff in error except, perhaps, in some cases, to add an additional ground of liability, which was not necessary to urge in this case. The admission of this immaterial testimony worked a hardship on the defendant in error, but certainly not upon the plaintiff in error, and its admission could not be justified unless upon the theory that the evidence in favor of the defendant in error was so overwhelming in character that the admission of immaterial evidence in favor of the plaintiff in error could not modify the result. The conclusive character of the testimony in her favor is substantially conceded by counsel for the company, for the record shows that he has, at no time, questioned its sufficiency. He did not ask the court to take the case from the jury, neither did he ask the court to set aside the verdict because of the insufficiency of the evidence to sustain it, and he is therefore precluded from questioning the rightfulness of the verdict.

In conclusion we wish to suggest that it is apparent from the entire record that this appeal was taken for delay only.

The points argued by the plaintiff in error are so trivial in their character, and have been so thoroughly settled by this and other courts that there is no longer room for argument as to their correctness.

It has been four years since the verdict in this case was rendered. The defendant in error has been suffering from the injuries received and in need of medical services which she has not been able to obtain. The action of the plaintiff in appealing the case has been more outrageous and inhuman than the original act of the porter, for it has simply been done with the view of injuring the defendant in error, with no just grounds for a reversal. We therefore ask the damages which the rules of the court permit in such cases.

Respectfully submitted,

JOY, CALL & JOY.

Wm L. Joy,
Atty. for Defr. in Error.